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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 910

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

vs.

GEORGE P. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1937
CERTIORARI GRANTED APRIL 26, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3221.

GEORGE P. DAVIS,

PLAINTIFF, APPELLANT;

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM FINAL DECREE (SWEENEY, J.), JANUARY 27, 1937.

TRANSCRIPT OF RECORD.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN,
for Appellants.

FREDERICK MANLEY IVES,
JOHNSON, CLAPP, IVES & KNIGHT,
for Edison Electric Ill'g Co., Appellee.

ROBERT H. JACKSON,
ASSISTANT ATTORNEY GENERAL,
CHARLES E. WYZANSKI, JR.,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,
ARTHUR L. MURRAY,
SPECIAL ASSISTANT TO UNITED STATES ATTORNEY,
for Commissioner of Internal Revenue et al., Appellees.

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NITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

o. 3221.

GEORGE P. DAVIS,
PLAINTIFF, APPELLANT,
v.
THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.,
APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

o. 4399, EQUITY DOCKET.

GEORGE P. DAVIS, PLAINTIFF,
v.
THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, DEFENDANT.

The bill of complaint in this cause was filed in the clerk's office on he seventeenth day of November, A. D. 1936, and was duly entered t the September Term of this court, A. D. 1936, and is in the words nd figures following:

BILL OF COMPLAINT.
[Filed November 17, 1936.]

George P. Davis of Waltham in the District of Massachusetts, as laintiff, in behalf of himself and all other stockholders in the de-endant who are similarly situated, brings this his bill of complaint gainst The Edison Electric Illuminating Company of Boston, a cor-oration duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston in aid District, and says as follows:

FIRST. This suit begun this seventeenth day of November, 1936, is of a civil nature in equity. The matter in dispute exceeds three thousand dollars exclusive of costs. The case arises under the Constitution of the United States of America and the Fifth Amendment thereof in that the plaintiff charges that Title VIII and prominently Sections 804 and 802 of Chapter 531 of August 14, 1935 (49 Stat. 620), commonly called The Social Security Act, is not an Act of the Congress within its powers under the Constitution but is an attempt capriciously to deprive of liberty and to confiscate private property without due process of law and without just compensation. This suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

SECOND. The plaintiff, a citizen of the Commonwealth of Massachusetts and of the United States of America, is the registered and legal holder of shares of the stock of the defendant, The Edison Electric Illuminating Company of Boston, a corporation duly organized under the laws of this Commonwealth with its usual place of business in Boston in said District, and represents a large number of shareholders therein. The plaintiff and said shareholders were at the time of the transactions herein complained of and have been continuously up to the present time such shareholders. The plaintiff brings this bill for himself and for all other shareholders of said corporation who may join herein.

THIRD. The defendant corporation. The Edison Electric Illuminating Company of Boston, is engaged in the business of manufacturing, purchasing, transmitting, distributing and selling electrical energy within the Commonwealth of Massachusetts. It is an employer as that word is used in Sections 804 and 802 aforesaid, in describing the persons subjected to the excise tax described in Section 804 and in the deduction requirements prescribed in Section 802. Said defendant was such an employer throughout the years 1935 and 1936 and proposes to continue to be such throughout the year 1937 and thereafter. Many employees of the defendant receive wages payable on a weekly basis and hence the first deduction required by the terms of Section 802 comes in the first week of the year 1937.

The amount of wages paid by this defendant to its employees is very many thousands of dollars a year.

FOURTH. The terms of said Section 804 are that the defendant shall pay an excise tax with respect to having individuals in its employ equal to the following percentages of the wages paid by the defendant after December 31, 1936. With respect to employment after such date during the years 1937, 1938 and 1939, 1 percent a year; with respect to employment during the years 1940, 1941 and 1942, 1½ percent a year; with respect to employment during the years 1943, 1944 and 1945, 2 percent a year; with respect to employment during the years 1946, 1947 and 1948, 2½ percent a year; with respect to employment after December 31, 1948, 3 percent a year. The terms of said Section 802 are that the defendant shall deduct a like amount from the wages of its employees and pay this sum as a withheld tax in terms imposed on its employees by Section 801 for which additional sum the defendant becomes liable.

FIFTH. Said Sections 804 and 802 in the context of said so-called Social Security Act are not an Act of the Congress within its powers but on the contrary said sections are beyond the powers of the Congress and if enforced would violate the Constitution of the United States and the Fifth Amendment thereof in that said impositions upon the defendant are not an excise tax or any tax of a kind which The Congress of the United States has any power to levy or impose and the said sections are an attempt capriciously to deprive the defendant of liberty of contract with its employees and to confiscate the defendant's private property without due process of law and without just compensation. An excise tax at the time of the adoption of the Constitution of the United States meant and now means solely a tax upon property in being, in use, in transit, in manufacture, or in sale, and the state of being an employer is not such property and even if said impositions were in their nature excise taxes they are capricious and arbitrary in the selection of the objects upon which they are imposed and they are not uniform throughout the United States and they are not imposed for the purpose of general revenue or for any purpose for which The Congress of the United States may impose taxes or excises. According to the figures of the United

States census and according to the figures before the Congress during the period when this matter was under consideration, approximately 44 percent of the gainful workers of the United States are not even potentially benefited by the attempted impositions and their employers are not subjected to the impositions, and approximately only 56 percent are potentially subject to the benefits to accrue from said Title VIII and the employers of said 56 percent are the only ones subjected to the exactions. The discrimination is arbitrary, capricious, and without justification. The attempted Act under which the attempted impositions are made is designed to impose any burden which the States may have to care for the aged, by poor relief or otherwise, upon a portion only of the people not uniformly chosen. It is not done for any welfare which is general, in contrast to local or State, or which is of the Government of the United States.

SIXTH. The plaintiff and others have advised the defendant, The Edison Electric Illuminating Company of Boston, of the claims of unconstitutionality aforesaid and have protested against the making of any payments in accordance with the terms of said Section 804 and the withholdings and payments in accordance with said Section 802. Said defendant has given careful consideration to said protests and to the question of making the payments and the withholdings required by the terms of said Sections 804 and 802, and has decided to make said payments in accordance with the terms of said two sections as rapidly as required by the terms thereof. Further appeals to the defendant, its directors or officers, are useless. The corporation intends, and has announced its intention, and proposes, unless restrained by this court, to make said payments and to make the first of them in the early part of January, 1937, and before January 15, 1937. Said defendant will make said payments at said times unless enjoined by this court.

SEVENTH. If the defendant makes the deductions aforesaid from the wages of its employees it will produce unrest among said employees and the defendant is in danger of being met by the requirement that said employees' wages be correspondingly increased so that said payments will ultimately fall upon the defendant, and so that even if said exactions should ultimately be held to be void the

defendant will have paid sums of money due its employees which as a legal matter the employer may not recover from the recipients thereof and as a practical matter it will be impossible for the defendant employer to recover back. Any payments made by the defendant may not be recovered by it except after long delay, if at all.

EIGHTH. The payments aforesaid are contrary to the rights of the plaintiff and the other stockholders in the defendant, The Edison Electric Illuminating Company of Boston, and by reason of all the foregoing the said defendant corporation and its stockholders will suffer an irreparable loss if it makes the payments aforesaid, and the plaintiff and said other stockholders in whose behalf this bill is brought will be injured in their holdings in many thousands of dollars.

NINTH. The plaintiff tenders herewith such security as the court may require as a condition of obtaining the temporary relief herein prayed for.

Wherefore the plaintiff prays:

(1) That the defendant corporation, The Edison Electric Illuminating Company of Boston, be, before January 1, 1937, forthwith enjoined until the further order of this court from making the payments and deductions defined in Title VIII, Sections 804 and 802, of Chapter 531 of August 14, 1935 (49 Stat. 620), commonly called The Social Security Act.

(2) That said Sections 802 and 804 be held to be not an Act of the Congress within its powers under the Constitution of the United States and the said temporary injunction be made permanent.

(3) That the plaintiff have such other and further relief as to the court may seem just and proper.

By his Attorneys,

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

At the same term, to wit, November 25, 1936, the following Defendant's Answer was filed:

DEFENDANT'S ANSWER.

[Filed November 25, 1936.]

Now comes the defendant in the above-entitled action and answers the allegations in the several paragraphs in the plaintiff's bill of complaint as follows:

1. The defendant admits the allegations of paragraph First, except the allegation with respect to Title VIII of the Federal Social Security Act, which allegation appears to raise a question of law which the defendant neither admits nor denies.

2. The defendant admits, as alleged in paragraph Second, that the plaintiff is a citizen of the Commonwealth of Massachusetts and of the United States of America and that the bill is brought in behalf of other stockholders of the defendant who may join therein; it says that the plaintiff is the registered holder as co-trustee under an indenture of shares of the defendant's capital stock and has been such stockholder since May 2, 1936; it is ignorant whether, as alleged, the plaintiff represents other shareholders of the defendant and whether such other shareholders were shareholders at the time of the transactions complained of, and neither admits nor denies said allegations.

3. The defendant admits the allegations in paragraph Third.

4. The defendant says that the allegations of paragraph Fourth appear to be merely an abstract of certain provisions of Sections 804 and 802 of said Title VIII of the Federal Social Security Act and believes them to be correct statements of the parts of said sections which are abstracted.

5. The defendant says that whether said Sections 804 and 802 are unconstitutional, whether they fail to impose a true excise tax, whether they are arbitrarily discriminatory, and whether they promote the general welfare, as alleged in paragraph Fifth, are questions of law which the defendant neither admits nor denies; it further says that it is ignorant whether the allegations with respect to figures of the United States census and figures before the Congress are true and neither admits nor denies the same.

6. The defendant admits the allegations in paragraph Sixth.

7. The defendant says that the allegations in paragraph Seventh are prophecies with respect to what may occur in the future and the defendant neither admits nor denies said allegations.

8. The defendant says that the allegations of paragraph Eighth appear to raise questions of law which the defendant neither admits nor denies.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON,
by its Attorneys,
FREDERICK MANLEY IVES,
JOHNSON, CLAPP, IVES & KNIGHT.

Also at the same term, to wit, November 30, 1936, the following Motion for Injunction Forthwith and for Final Decree with accompanying affidavit was filed:

MOTION FOR INJUNCTION FORTHWITH AND FOR FINAL DECREE WITH ACCOMPANYING AFFIDAVIT.

[Filed November 30, 1936.]

The plaintiff moves on bill and answer and on the affidavit presented herewith in support of the truth of the bill, that an injunction issue forthwith as prayed for in the bill of complaint and that a final decree be entered forthwith as prayed for therein.

By his Attorneys,
EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

November 27, 1936.

To Frederick M. Ives, Esq., Attorney for Defendant, 50 State Street, Boston, Massachusetts.

We shall present the above motion, and accompanying affidavit, for allowance by the District Court in the court room presided over by the Honorable George C. Sweeney at twenty-five minutes past ten o'clock in the morning on Monday, November 30, 1936.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

Notice received November 27, 1936.

FREDERICK MANLEY IVES.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION.

COMMONWEALTH OF MASSACHUSETTS,
DISTRICT OF MASSACHUSETTS, ss. November 18, 1936.

I. George P. Davis, the plaintiff in the above-entitled bill of complaint, on oath depose and say that I have read the bill of complaint filed in this case in this court on November 17, 1936, and that the allegations of the First, Second, Third, Fourth, Seventh and Ninth paragraphs thereof are true of my own knowledge and that as to the allegations of the Fifth, Sixth and Eighth paragraphs thereof I have been credibly informed and verily believe and charge that they are true.

GEORGE P. DAVIS.

Subscribed and sworn to, before me,

BERTHA A. PATTEN,
Notary Public.

[SEAL]

On the said thirtieth day of November, A. D. 1936, the following Motion for Leave to File Petition to Intervene was filed:

MOTION FOR LEAVE TO FILE PETITION TO INTERVENE.

[Filed November 30, 1936.]

Now come Guy T. Helvering and William M. Welch, your petitioners, by their attorneys, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arnold Raum, Special Assistant to the Attorney General of the United States, and move the court for leave to file their intervening petition herein, which intervening petition accompanies this motion.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,

ARNOLD RAUM,
Special Assistant to the Attorney General.

11-30-36. GEO. C. SWEENEY.

Also on the said thirtieth day of November, the following Order Granting above Motion was entered:

ORDER GRANTING MOTION FOR LEAVE TO FILE PETITION TO INTERVENE.

November 30, 1936.

This cause coming on to be heard on the thirtieth day of November, 1936, on the motion of Guy T. Helvering and William M. Welch for leave to file a petition to intervene in the above entitled suit, and the motion having been duly considered:

It is therefore ordered, adjudged and decreed that said motion be, and hereby is, granted.

GEO. C. SWEENEY,

United States District Judge.

Thereupon, on said thirtieth day of November, A. D. 1936, the following petition to intervene of Guy T. Helvering and William M. Welch was filed:

PETITION TO INTERVENE OF GUY T. HELVERING AND WILLIAM M. WELCH.

[Filed November 30, 1936.]

Now come Guy T. Helvering and William M. Welch, your petitioners, by their attorneys, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arnold Raum, Special Assistant to the Attorney General of the United States, and respectfully allege and show as follows:

1. The petitioner Guy T. Helvering is United States Commissioner of Internal Revenue, officially stationed at Washington, D. C.

2. The petitioner William M. Welch is United States Collector of Internal Revenue for the District of Massachusetts, officially stationed at Boston, Massachusetts.

3. The above entitled cause was commenced in this court by the filing of a bill of complaint on November 17, 1936. The petitioners are informed that the defendant has filed an answer on November 25, 1936, to said bill of complaint.

4. Said bill of complaint is brought by George P. Davis, alleging

that he is the holder of an unspecified numbes of shares of stock of the defendant, The Edison Electric Illuminating Company of Boston, and seeks a temporary injunction against said defendant's paying the taxes which may become due from said defendant under Title VIII, Section 804, of the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, U. S. C., Title 42, c. 7.

Said George P. Davis also seeks to have said corporation temporarily enjoined from making deductions from the wages of the employees of said defendant of such amounts as may be required to be collected by employers from employees under Title VIII, Section 802, of said Social Security Act, and from paying over such amounts in accordance with the terms of said provisions. Said George P. Davis asks further that such temporary relief be made permanent. The bill of complaint alleges that Sections 802 and 804 of said Social Security Act are not an Act of Congress within its powers under the Constitution of the United States and asks that they be so declared.

5. The petitioners have a direct interest in this litigation inasmuch as all such taxes as are imposed by Sections 802 and 804 of said Social Security Act are required to be collected by the United States Bureau of Internal Revenue and inasmuch as the petitioner, Guy T. Helvering, as Commissioner of Internal Revenue, is the head of said Bureau, and William M. Welch, as Collector of Internal Revenue for the District of Massachusetts, is the officer of the United States charged with the duty of collecting United States internal revenue taxes in the District of Massachusetts.

6. The interest of these petitioners was recently recognized by this court in permitting them to intervene in the cause of *George P. Davis* v. *Boston and Maine Railroad*, Equity No. 4392, a similar proceeding in which complaining stockholder sought to enjoin the defendant corporation from paying taxes under Title IX as well as under Title VIII of said Social Security Act. Further, the interest of the petitioners herein is such that they could properly have been named parties defendant. *Hill* v. *Wallace*, 259 U. S. 44, 45, 62–63; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 278–279.

Wherefore, petitioners pray that this court make an order granting

them leave to intervene herein as defendants with leave to file on or before the twentieth day from the date of such order, an answer herein, and for such other and further relief as to this court seems just.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.
ARNOLD RAUM,
Special Assistant to the Attorney General.

November 30, 1936.

UNITED STATES OF AMERICA.
DISTRICT OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

Arnold Raum, Special Assistant to the Attorney General of the United States, being duly sworn, deposes and says that he is the attorney for the petitioners named in the foregoing petition, that he is acquainted with the facts, that he has read the contents of the petition, and that the statements made are true as he verily believes.

ARNOLD RAUM.

Sworn to before me this thirtieth day of November, 1936.

CHARLES A. ROME,
Notary Public.

[SEAL]

Also on said thirtieth day of November, A. D. 1936, the following Orders were entered:

ORDER GRANTING PETITION TO INTERVENE.

November 30, 1936.

This cause coming on to be heard on the thirtieth day of November, 1936, on the petition of Guy T. Helvering and William M. Welch to intervene in the above entitled suit and to be made parties defendant thereto, and the petition having been duly considered, and it appearing to the court that said Guy T. Helvering and said William M.

Welch have an interest in the above entitled suit sufficient to warrant them in becoming parties to this suit:

It is therefore ordered, adjudged and decreed this thirtieth day of November, 1936, that Guy T. Helvering and William M. Welch be, and they hereby are, granted leave to intervene in said suit, as parties defendant, with leave to file, on or before the nineteenth day from the date of this order, an answer herein.

GEO. C. SWEENEY,
United States District Judge.

ORDER RELATIVE TO HEARING.
November 30, 1936.

The above-entitled case is set this thirtieth day of November, 1936, for hearing on the merits on bill and answer and motion for injunction forthwith on January fifth, 1937, at Boston Mass., briefs to be filed on or before January fifth, 1937.

GEO. C. SWEENEY,
United States District Judge.

This cause was thence continued to the present December Term, A. D. 1936, when, to wit, December 18, 1936, the following motion of Guy T. Helvering and William M. Welch to strike part of plaintiff's bill of complaint is filed:

MOTION OF GUY T. HELVERING AND WILLIAM M. WELCH, INTERVENING DEFENDANTS, TO STRIKE PART OF THE PLAINTIFF'S BILL OF COMPLAINT.
[Filed December 18, 1936.]

Now come Guy T. Helvering and William M. Welch, intervening defendants in the above-entitled cause, and move the court to strike from the plaintiff's bill of complaint filed on the seventeenth day of November, 1936, in the above-entitled cause, so much of said bill of complaint as relates to the tax imposed upon employees by Title VIII of the Social Security Act (c. 531, 49 Stat. 620), to wit: in the paragraph designated "First", the phrase "and 802"; in the paragraph designated "Third", the phrase "and 802", the words "and in the deduction requirements prescribed in Section 802", and the next to

the last sentence of said paragraph; in the paragraph designated "Fourth", the last sentence thereof; in the paragraph designated "Fifth", all references to Section 802, the taxes involved in said section, and all allegations with respect thereto; in the paragraph designated "Sixth", all references to Section 802 and the withholding and payment of taxes involved therein; the entire paragraph designated "Seventh"; such portions of the paragraph designated "Eighth" as may relate to the tax imposed upon employees by Title VIII of the Social Security Act, as aforesaid; and so much of the prayer for relief as relates to Section 802 of said Social Security Act, and to deductions and payments provided for in said Section 802.

This motion is made on the ground that the taxes involved in Sections 801 and 802 of the Social Security Act, as aforesaid, are imposed upon employees; that the defendant employer, not being subject to tax under those provisions, does not have any standing to challenge the validity of such taxes; and that the plaintiff, whose rights are at most derivative from the defendant, has even less standing to challenge the validity of such taxes.

FRANCIS J. W. FORD.
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

On the said eighteenth day of December, A. D. 1936, the following answer of Guy T. Helvering et al. is filed:

ANSWER OF GUY T. HELVERING AND WILLIAM M. WELCH, INTERVENING DEFENDANTS.

[Filed December 18, 1936.]

Come now Guy T. Helvering, Commissioner of Internal Revenue, and William M. Welch, Collector of Internal Revenue for the Collection District of Massachusetts, intervening defendants in the above entitled cause, by Francis J. W. Ford, United States Attorney in and for the District of Massachusetts, their attorney, and pursuant to leave granted by this court on November 20, 1936, and without waiving any of their rights and defenses under the motion filed herein

to strike parts of the plaintiff's bill of complaint, but expressly relying upon the same, as fully and completely as if the grounds of said motion were repeated herein, and expressly reserving unto themselves all manner of exceptions to the errors and insufficiencies of the bill filed herein and to the jurisdiction of the court in the premises, and relying on same as if motion to dismiss were interposed; nevertheless, answering so much and such parts of the bill of complaint herein as they are advised it is material or necessary for them to make answer unto, say:

1. For answer to the first paragraph of the bill, these defendants admit that this is a suit of a civil nature in equity, but they say that they are without knowledge as to whether the matter in dispute exceeds $3,000, exclusive of interest and costs. For further answer to the first paragraph of the bill, these defendants aver that the averments therein contained with respect to Title VIII of the Social Security Act are conclusions of law which they are not called upon to answer. Further answering, these defendants deny each and every averment in the first paragraph of the bill not herein specifically admitted.

2. For answer to the second paragraph of the bill, these defendants admit that the plaintiff is a citizen of the Commonwealth of Massachusetts and of the United States of America, and that the defendant corporation is organized under the laws of Massachusetts and has its usual place of business in Boston. These defendants are without knowledge with respect to whether the plaintiff is the registered and legal holder of shares of stock of the defendant corporation, and whether plaintiff represents a large number of shareholders therein, or with respect to any of the other averments contained in the second paragraph of the bill.

3. Answering the third paragraph of the bill, these defendants are without knowledge as to any averments of fact therein contained. These defendants deny the materiality and accuracy of the arguments, legal conclusions and averments set forth in said paragraph with respect to definitions, use of words, scope or effect of either Section 802 or 804 of the Social Security Act, and for a true, correct, and complete statement of the provisions of said Act applicable herein

these defendants respectfully refer the court to said sections of the Act. Further answering the third paragraph of the bill, these defendants aver that the taxes imposed by Section 802 of the Act are not involved herein, and that all averments with respect to the provisions of said section or its application herein are redundant, irrelevant and immaterial.

4. Answering the fourth paragraph of the bill, these defendants admit that said Act provides, in part, as recited in the fourth paragraph of the bill; but, however, for a true, correct, and complete statement of the provisions of the Social Security Act, these defendants respectfully refer the court to the said Act.

5. Answering the fifth paragraph of the bill, these defendants deny that Sections 804 and/or 802 in the context of the Social Security Act are not an act of the Congress within its powers; deny that said sections, or either of them, are beyond the powers of the Congress; deny that, if enforced, or otherwise, said sections, or either of them, would violate the Constitution of the United States and/or the Fifth Amendment thereof; deny that the taxes imposed by said sections, or either of them, upon the defendant corporation, are not an excise tax and/or any tax of a kind which the Congress of the United States has power to levy and/or impose; and deny that either of said sections is an attempt capriciously, or otherwise, to deprive the defendant, or any other person, of liberty of contract with its employees, or with any other person or persons, and/or to confiscate the defendant's private, or other, property without due process of law, and/or without just compensation, or at all. Further answering the fifth paragraph of the bill, these defendants deny both the materiality and the accuracy of plaintiff's conclusions with respect to the meaning of an excise tax, and assert that the averments with respect thereto are mere conclusions of law which these defendants are not called upon to answer. As to the figures of the United States census or the figures before the Congress when the Social Security Act was under consideration, or the percentage of gainful workers, or those subject to benefits to accrue under Title VIII of said Act, or those not subject to the benefits thereof, or subject to the exactions or impositions of tax thereunder, these defendants say that they are without

knowledge with respect thereto. Further answering, these defendants deny that the, or any, discrimination is arbitrary, capricious, and/or without justification, and aver that there is no discrimination either in fact or in law in the application of the provisions of the Social Security Act. These defendants further deny that the Act is designed to impose any burdens which any of the States may have to care for the aged, by poor relief, or otherwise, upon a portion only of the people, not uniformly chosen, or at all, and deny that it is not done for any welfare which is general in contrast to local or State, or which is of the Government of the United States, or otherwise. Further answering the fifth paragraph of the bill, these defendants deny each and every averment of fact, if any, therein contained. Further answering the fifth paragraph of the bill, these defendants aver that the plaintiff herein is not in any position to challenge in this suit the propriety or legality of the tax which has been imposed by the Congress upon employees in Title VIII of the Social Security Act.

6. Answering the sixth paragraph of the bill, these defendants aver that they are without knowledge with respect to any of the averments therein contained. Further answering the sixth paragraph of the bill, these defendants deny the materiality of any of the averments therein with respect to Section 802 of the Social Security Act and the deductions and payments therein provided. Further answering the sixth paragraph of the bill, these defendants aver that the taxes imposed by Section 802 of the Act are not involved herein, and that all averments with respect to the provisions of said section or its application herein are redundant, irrelevant and immaterial.

7. Answering the seventh paragraph of the bill, these defendants aver that the averments therein contained are wholly immaterial to any issue involved in this cause, but if deemed by the court to be material, these defendants deny that, if the defendant corporation makes the, or any, deductions therein referred to from the wages of its employees, it will produce unrest among said employees, or at all; deny that said defendant is in danger of being met by the, or any, requirement that the wages of said employees be correspondingly, or otherwise, increased; deny that said payments will ultimately, or at

all, fall upon said defendant; deny that, if said exactions should be ultimately held to be void, said defendant will have paid sums of money due its employees which as a legal matter, or otherwise, the employers may not recover from the recipients thereof; and deny that as a practical matter, or otherwise, it will be impossible for the defendant employer to recover back. These defendants further deny that any payments made by the defendant corporation may not be recovered by it, if it is legally entitled to recover said payments.

8. Answering the eighth paragraph of the bill, these defendants deny that any of the payments described in the bill are contrary to the rights of the plaintiff and/or any of the other stockholders in the defendant corporation; deny that for any reason whatsoever the defendant corporation and/or any of its stockholders will suffer an irreparable or other loss, or at all, if it makes the, or any, payment described in the bill; and deny that the plaintiff and/or any of its other stockholders would be injured in their holdings or otherwise in many thousands of dollars, or in any amount whatsoever.

9. These defendants deny each and every averment contained in the bill of complaint not hereinbefore admitted, qualified, explained, or denied.

10. For further and separate defense to the bill of complaint, these defendants reserve and rely upon all of the grounds set forth in their motion to strike certain portions of the bill filed in this cause, and say:

a. That so much and such parts of said bill of complaint as refer to Section 802 of the Social Security Act are redundant, irrelevant and immaterial.

b. That the plaintiff herein is not in any position to challenge in this suit the propriety or legality of the tax which has been imposed by the Congress upon employees in Title VIII of the Social Security Act.

11. For further, separate and complete defense to the bill of complaint, these defendants say that the bill of complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for in a court of equity.

Wherefore, having fully answered the bill of complaint, these de-

fendants pray that the bill be dismissed and that they recover their costs herein.

GUY T. HELVERING,
Commissioner of Internal Revenue.

WILLIAM M. WELCH,
Collector of Internal Revenue for the Collection District of Massachusetts.

FRANCIS J. W. FORD, *United States Attorney,*
Solicitor for Intervening Defendants,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

William M. Welch, being duly sworn according to law, says that he is one of the intervening defendants in the above entitled cause, and that the facts set forth in the foregoing answer of intervening defendants to bill of complaint, which are within his knowledge, are true and correct, and the facts averred upon information received from others are based upon information received from reliable sources and which he verily believes to be true; and all of which the intervening defendants expect to be able to prove on the trial of this cause. WILLIAM M. WELCH.

Sworn and subscribed to before me this nineteenth day of December, 1936. GRACE E. LINEEN,
[SEAL] *Notary Public.*

At the present December Term of this court, A. D. 1936, this cause is submitted on briefs of both parties in accordance with the order of November 30, 1936, and on the twenty-seventh day of January, A. D. 1937, an opinion of the court is announced, denying the prayer for injunction and dismissing bill.

Thereupon to wit, January 27, 1937, the following Final Decree is accordingly entered:

FINAL DECREE.

January 27, 1937.

SWEENEY, J. This case came on this twenty-seventh day of January, 1937, for the entry of a final decree pursuant to the opinion handed down this day; and thereupon, upon consideration thereof, be it and it is hereby

Adjudged, ordered and decreed that the plaintiff or the defendant corporation has not such an interest in the collection and payment of the income taxes assessed under Title VIII of the Social Security Act as would entitle them to question the constitutionality of the income tax feature and that Section 804 of said Title VIII imposes a valid excise tax on the defendant corporation and that therefore the prayer for an injunction is denied and the bill of complaint is dismissed.

By the Court,

ARTHUR M. BROWN,

Deputy Clerk.

1-27-37.

GEO. C. SWEENEY.

From the foregoing final decree, the plaintiff claimed an appeal on January 28, 1937, to the United States Circuit Court of Appeals for the First Circuit, which appeal was allowed by the court on the same day.

OPINION.

January 27, 1937.

SWEENEY, J. This is a suit in equity in which the petitioner, a stockholder in the respondent corporation, seeks to enjoin the corporation from paying (a) taxes levied by Title VIII of the Social Security Act against the respondent, and (b) taxes levied by the same title against employees of the respondent which is charged with the duty of withholding the said tax from the wages of its employees, and remitting it to the Treasurer of the United States. The United States Commissioner of Internal Revenue and the United States Collector of Internal Revenue for the District of Massachusetts have been allowed to intervene as parties defendant.

Findings of Fact.

The petitioner is the registered and legal owner of an unknown number of shares of stock of the respondent. The respondent is an employer within the meaning of Sections 804 and 802 of the Social Security Act. By Section 804 of the Act, the respondent is charged with the payment of an excise tax "with respect to having individuals in (its) employ" in accordance with the table of percentages contained in that section. Section 802 of the Act charges the employer with the duty of collecting, by deductions from the wages of employees, an income tax assessed against employees in accordance with the table of percentages set forth in Section 801 of the Act.

The basis of the petitioner's complaint is that Sections 804 and 802 of the Social Security Act are unconstitutional as not being within the powers of the Congress to enact. The petitioner has made representations of the unconstitutionality of the Act to the respondent. Nevertheless, the respondent has decided to make the payments as required by the Act. The petitioner, alleging that the payments by the corporation are being made or are to be made under an unconstitutional Act of Congress, brings this suit to restrain the respondent from making such payment. The intervening defendants, hereinafter referred to as the Government, have filed a motion to strike the portions of the petitioner's bill that complain of the tax imposed upon employees by Section 802 of Title VIII. The basis for the motion is that as the respondent is merely an agency for the collection of the taxes assessed against the employees, and is not subject to tax under this Section, it has no standing to challenge the validity of that Section, and that the petitioner whose rights are derivative from the respondent corporation has no better standing than the corporation.

Conclusions.

This case has been submitted to the court on the pleadings, the Government asking for a dismissal of the action. The petitioner alleges in his bill that the deduction of the tax from the employees' wages will cause unrest amongst them, and thereby result in injury to the corporation. At best this is mere conjecture, and, if threat-

ened, is too remote to consider as a proper basis for the relief asked. It does not appear that the petitioner, or even the corporation, has such a protected legal interest in the collection and the payment of the income taxes assessed against the employees as would entitle them to question the constitutionality of the income tax feature. In *Frothingham* v. *Mellon,* 262 U. S. 447, 488, the court, in discussing its power to pass on constitutional questions, stated: "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." I am of the opinion that the petitioner has not stated such a cause of action as would entitle him to question the validity of the income tax feature of Title VIII.

Section 804 of Title VIII imposes an excise tax upon employers "with respect to having individuals in his (its) employ" based upon a percentage of wages paid by the said employers. Considering this section by itself, and not as it may be related to other Titles of the Social Security Act, it is identical with Section 901 of Title IX as a tax raising measure. Section 901 of Title IX has been held by this court to be a valid exercise of the taxing powers reposed in Congress, complying with the limitation of uniformity, and is a measure to provide for the general welfare of the United States, and is therefore constitutional. (See *Davis* v. *Boston & Maine Railroad.*) Everything that this court has said in that case is equally applicable to Section 804 of Title VIII. I therefore rule that the tax laid down by Section 804 of Title VIII of the Social Security Act is constitutional.

The contention is made that Titles VIII and II should be consid-

ered together because Title VIII is the taxing measure to provide the funds to be expended under Title II. The complete answer to this contention is that the various Titles of the Act are separable (Section 1103 of Title XI). The Act makes provision that the funds collected under Title VIII go into the general Treasury of the United States to be there subject to any and all valid appropriations. If we are to presume that the expenditures under Title II of the Act would be held in the future to be beyond the powers of the United States to make, it does not neecssarily follow that Title VIII as a tax raising measure would fail. No such situation is presented here as was presented in *United States* v. *Butler*, 297 U. S. 1, where the funds collected were earmarked for a particular purpose which was held to be not within the powers of the Congress to regulate. In the present instance, Title VIII is self sufficient as a tax raising measure, and I am of the opinion, and therefore hold, that it is constitutional. This petitioner has no standing in the present case to question the expenditures of the money raised under Title VIII until such time as the money raised under Title VIII is appropriated for the purpose of Title II, or for any other purpose. We are not to assume that such expenditure will be unconstitutional.

The prayer for an injunction is denied, and the bill is to be dismissed.

PLAINTIFF'S PETITION FOR APPEAL AND ASSIGNMENTS OF ERROR.

[Filed January 28, 1937.]

The plaintiff, aggrieved by the final decree entered in this case this day and by the proceedings on which the same was based in the respects described in the assignments of error herewith, appeals to the Circuit Court of Appeals for the First Circuit from said final decree and prays that this its claim of appeal may be allowed and that the transcript of the record upon which the said decree was based, duly authenticated, may be sent to said Circuit Court of Appeals.

PLAINTIFF'S ASSIGNMENTS OF ERROR.

1. The plaintiff assigns that the District Court erred in deciding that the plaintiff and the defendant corporation did not have such an

interest in the income taxes to be withheld and paid over by the corporation under Section 802 of Title VIII as would entitle them to question the constitutionality of the income tax feature.

2. The plaintiff assigns that the District Court erred in deciding that Section 804 of Title VIII imposes a valid excise tax on the defendant corporation and that therefore the prayer for injunction is denied and the bill of complaint is dismissed.

By its Attorneys,

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

Appeal allowed and bond approved but not as a supersedeas.

GEO. C. SWEENEY,
United States District Judge.

1-28-37.

On the twenty-eighth day of January, A. D. 1937, a bond on appeal was filed in the sum of $250, the Hartford Accident and Indemnity Company acting as surety. Said bond on appeal was approved by the court, but not as a supersedeas, on the same day.

PLAINTIFF'S PRAECIPE.

[Filed January 28, 1937.]

In preparing the record the clerk will please include only the following:

1. Bill of complaint.

2. Defendant's answer of The Edison Electric Illuminating Company of Boston, filed November 25, 1936.

3. Motion for injunction forthwith filed November 30, 1936.

4. Affidavit in support of application for preliminary injunction.

5. Motion for leave to file petition to intervene by Guy T. Helvering and William M. Welch filed November 30, 1936.

6. Order granting motion for leave to file petition to intervene filed November 30, 1936.

7. Petition to intervene of Helvering and Welch filed November 30, 1936.

8. Order granting petition to intervene entered November 30, 1936.

9. Order relative to hearing entered November 30, 1936.

10. Motion of Helvering and Welch to strike filed December 18, 1936.

11. Answer of Helvering and Welch filed December 18, 1936.

12. Opinion of Judge Sweeney handed down January 27, 1937.

13. Final Decree entered pursuant thereto.

14. Petition for appeal and assignments of error.

15. Notation of appeal bond, and citation, and acceptance of service.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN,
Attorneys for Plaintiff.

Praecipe approved.

FREDERICK MANLY, Jr.,
Attorney for The Edison Electric Illuminating Company of Boston.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,
Attorneys for Defendants Helvering and Welch.

A citation on appeal was issued on January 28, 1937, and was made returnable in the United States Circuit Court of Appeals thirty days from date. Service of said citation was duly accepted by the attorney for The Edison Electric Illuminating Company of Boston and by the United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been designated by praecipe in the cause entitled,

No. 4399, EQUITY DOCKET.

GEORGE P. DAVIS, PLAINTIFF,

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal, the bond on appeal and the citation on appeal with the acceptance of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this fourth day of February, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 12, 1937, this cause came on to and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James J. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fourteenth day of April A. D. 1937, the following opinion of the Court and Dissenting Opinion was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3221.—October Term, 1936

GEORGE P. DAVIS, PLAINTIFF, APPELLANT

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

April 14, 1937

WILSON, J.: This is a bill in equity brought by a stockholder of the defendant company seeking to enjoin the defendant from paying the tax imposed on it by Sec. 804 of Title VIII of Chap. 531, 49 Stat. 620, known as the Social Security Act, on the ground that the tax is not one authorized by Sec. 8 of Art. I of the Constitution of the United States, that the Act infringes the rights of the States, and imposes a capricious and arbitrary burden on those whom it affects.

The District Court of Massachusetts held Secs. 801 and 804 of Title VIII were valid exercises of powers of Congress within the field of federal authority, and that the funds collected from such taxes go into the treasury of the United States and are there subject to such appropriations as Congress sees fit to make, since they are not "earmarked" as collected for any particular purpose, and therefore a taxpayer cannot object to an action by Congress in appropriating funds in the United States treasury.

The plaintiff appealed and assigned as errors that the District Court erred in holding that the plaintiff had no standing to question the validity of the tax imposed by Sec. 801, and that the District Court erred in holding that Sec. 804 imposed a valid excise tax on the defendant.

It is contended by the government that, whatever is decided with reference to the validity of the tax on employers under Sec. 804, the tax on the employees under Sec. 801 is a valid income tax. Standing alone it may well be, but whether it can be considered as within the intent of Congress that it shall be enforced if the other features of Title VIII are held invalid or must fall with the tax on the employers, may well be questioned.

The government also contends that Title VIII has no direct relation to Title II, or, if so, Title II of the Act is a valid exercise of the power of Congress to appropriate money in the treasury for any purpose it may deem for the general welfare of the United States.

The assistance of those incapacitated by age from earning a livelihood is one of the powers belonging to, and burdens imposed on, the States at the time of the adoption of the federal Constitution. If so, the power to deal with it was expressly reserved to them under the Tenth Amendment. It is not to be lightly assumed that the several States whose governments are much closer to their people than Congress is, have failed in this duty as their people see it. But even if they have and Congress is right in its view that the aged are entitled to more definite and more generous assistance than they have received from the several States, the failure of the States (in the opinion of Congress) would not operate to extend the power of the federal government over this distinctly state field. The principle involved in the argument for the government, although it is not so stated, is that in any field reserved to the States, in respect to which in the opinion of Congress the States are not doing their duty, it may step in and take the matter out of their hands under the "general welfare" clause. It was not denied by counsel for the government that Congress could, if it saw fit, take over general education in the same indirect way, by establishing its Board of Education and taxing heavily the States whose systems did not conform to the ruling of the Board. Obviously, this principle, if accepted, marks the end of responsible state government. We are not unmindful of the argument that the increasing unification of the country in economic and industrial fields and the competition among the States to extend their industries make the States reluctant to impose burdens for old age assistance which would handicap their industries, and that the matter should therefore be dealt with by the federal government, thereby equalizing such burdens throughout the country. The argument applies to many other aspects of daily life besides old age assistance. There are those who urge that our frame of government should be greatly revised. Such considerations are plainly not for the courts. Their duty is to enforce the stated boundaries between the federal and the state governments as they now exist. They have not hesitated, for instance, to strike down state laws which interfered with the federal power over interstate commerce. It is equally their duty to strike down federal laws which interfere with the power of the States.

It is true that the plaintiff's bill as drawn raises no issue as to the validity of Title II, nor does Title VIII in any way refer to

the provisions of Title II as indicating the purposes for which the taxes under Title VIII are imposed. If Title II bears no relation to the provisions of Title VIII, then it may be that the plaintiff has no standing to question the validity of Title II under Massachusetts v. Mellon, and Frothingham v. Mellon, 262 U. S. 447; but there are indications in both Title II and Title VIII, when taken together, that the taxes imposed under Secs. 801 and 804 of Title VIII, while not earmarked in the sense counsel for the government contends, are to be construed together. Both Titles are a part of an Act entitled:

"An Act To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes."

It is apparent from the language of Secs. 202 and 210 of Title II and Sec. 811 of Title VIII that it was the intent of Congress that the taxes raised in Secs. 801 and 804 of Title VIII were imposed for the express purpose of paying the old age benefits provided for in Title II. It is not within reason to suppose that Congress would by Sec. 801 of Title VIII compel employees to give up three percent of their earnings, if it were not contemplated that it would ensure them the benefits provided for in Title II.

We think that the power to provide for "old age benefits" was among those powers reserved to the States under the Tenth Amendment, and that a tax imposed to benefit slightly over half of the people over sixty-five years of age and who are the care or burden of the States, cannot be said to be imposed for the general welfare of the United States and the taxes under Title VIII would fail for this reason.

Following the reasoning of our opinion in the recent case of George P. Davis v. Boston & Maine Railroad Company, we think the tax imposed with respect to having individuals in one's employ cannot be upheld as an excise tax authorized under Sec. 8 of Art. I of the Constitution, for the reason stated in the opinion in that case, since it was a tax on the natural and common right of employing labor, and is not a tax on property manufactured, sold or in use, or on a privilege granted by any government, and was not within the purview of the framers of the Constitution or the people in adopting it.

The power vested in Congress under Sec. 8 of Art. I of the Constitution is undoubtedly a broad power and covers a wide range of taxable subjects, but that it was intended by those adopting the Constitution that it should reach every possible relation between employer and employee was a subject for taxation, we cannot agree. Certain particular vocations in which the public may have an inter-

est, such as attorneys, inn-keepers, or auctioneers, may be subject to excise taxes, as was said in Thomas v. United States, 192 U. S. 363; but the right to employ labor in ordinary business is not a commodity or a privilege that is subject to a tax. Congress may tax the right to do certain kinds of business, or corporations holding a franchise from a state, based on their income, as in the case Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; Flint v. Stone Tracy Co., 220 U. S. 107. It has never been held, however, either by the Supreme Court of the United States, or the Supreme Court of any state, so far as we are advised, that Congress had the power to tax the common right to employ labor. It is like taxing a person's right to work.

Such a levy was held not to be within the taxing power of the Canadian Parliament. Canada Law Reports, 1036, Part VII, p. 454. In effect, it was held in this case that employment of labor was not a privilege derived from the Canadian government, and an excise tax on the right to employ was beyond the powers of the Canadian Parliament and invalid.

In the case of James v. Commonwealth of Australia, 1936, A. C. 578, in which the British Privy Council held that an Act of the Commonwealth of Australia to control and limit the products of agriculture was unconstitutional, Lord Wright, Master of the Rolls, said:

"But these inconveniences are liable to flow from a written constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistent with any construction of the constitution which is in accord with sound principles of interpretation. To give that effect would amount to rewriting, not construing, the constitution. That is not their Lordships' function."

The limitation upon the power to impose excise taxes was well stated in the opinion of the Justices in 247 Mass. 589, 593:

"The right to set up and maintain theatres and other places of amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling, cannot be subjected to a license fee or excise."

Again, on page 597, the Justices said:

"The rights to labor and to do ordinary business are natural, essential, and inalienable, partaking of the nature of personal liberty and of private property."

If Congress can tax the common right to employ labor and appropriate the money so collected to any object it sees fit, however it may concern the domestic affairs of the States, and the courts are powerless under the decision in Massachusetts v. Mellon and Frothingham v. Mellon, 292 U. S. 447, the States will soon, under the policy of recent Congresses, be reduced to "mere geographical subdivisions of the national domain."

"'The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states.' Every journey to a forbidden end begins with the first step; and the danger of such a step

by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their power, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." Carter v. Carter Coal Co., 298 U. S. 238, 295.

"It is not the province of the court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the federal constitution does not provide for it." Schechter Corp. v. United States, 295 U. S. 495.

The recent legislation of the so-called National Recovery Act, the Agricultural Adjustment Act, the Guffey Coal Act, the Railroad Retirement Act, and the Child Labor Act, all remind us that, unless the courts are continually on guard to preserve the dual form of our government as founded by our forefathers, the States will indeed become mere "geographical subdivisions of our national domain."

It cannot be sustained that such a tax as the one imposed under Sec. 804 of Title VIII was clearly within the purview of those who adopted the Constitution or the framers thereof, and where the application of a taxing statute is doubtful it should be resolved against the government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179, 187–188.

It is also urged by counsel for the plaintiff that if the taxes imposed under Secs. 801 and 804 are held for the purpose of paying the old age benefits provided for under Title II, there is additional basis for holding them invalid on the ground that to except those classes defined in Sec. 210 of Title II from the benefits of the tax is both capricious and arbitrary, and that such exactions cannot be justified as a tax, since it would violate the Fifth Amendment of the Constitution. Both men and women in the excepted classes, on reaching the age of sixty-five, are equally entitled to "old age benefits" as those engaged in other lines of work, since need is not essential to entitle one to the benefits.

We are, therefore, of the opinion that whether the taxes levied under Title VIII are levied for the purposes set forth in the preamble of the Act, or as defined in Title II, the imposition of such taxes is not a valid exercise of the power vested in Congress under Sec. 8 of Art. I of the Constitution of the United States.

The decree of the District Court is reversed with one bill of costs to the plaintiff, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

BINGHAM, J. (dissenting): The constitutionality of Section 801, Title VIII, levying an income tax on employees is not open to question by the plaintiff, a stockholder in the defendant corporation.

The defendant corporation has no interest in the tax. It merely withholds it from the employee's wages. It does not pay the tax, and certainly the plaintiff-stockholder does not. As neither one pays or has any interest to protect, neither can question its validity. Massachusetts v. Mellon, 262 U. S. 447.

The only question in this case, therefore, is the constitutionality of Section 804 of Title VIII, laying an excise tax on the employer. The contention of the appellant is that it does not lay a valid excise tax.

Under this section, the subject of the tax is any employer of labor in a trade or business, except farm labor, domestic service in a private home, casual labor not in the course of the employer's trade or business, services of an individual of the age of sixty-five, of an officer or member of a crew, of one in the employ of the United States Government or of its instrumentalities, or in the employ of a State, or political subdivision thereof, or an instrumentality of one or more States or political subdivisions, services in the employ of a corporation or organizations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the earnings of which enures to the benefit of any private shareholder or individual. The object of the tax is the act of having individuals in the employer's trade or business during a given calendar year. And the measure of the tax is the wages earned and paid employees over and above $3,000 in that year.

The tax is to be collected by the Bureau of Internal Revenue and paid into the Treasury of the United States as internal revenue collections.

I regard the tax as an excise, lawfully laid, for the collection and payment of general revenue into the Treasury of the United States. See my dissent in Davis v. Boston & Maine Railroad Co., filed April 14, 1937.

On the same day, to wit, April 14, 1937, the following Final Decree was entered:

Final decree

April 14, 1937

This cause came on to be heard February 12, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 14, 1937, here ordered, adjudged, and decreed as follows: The decree of the District Court is reversed with one bill of costs to the plaintiff, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 34, inclusive, contain and are a true copy of the record and all proceedings to and including April 17, 1937, in the cause in said court numbered and entitled, No. 3221, George P. Davis, plaintiff, appellant, v. The Edison Electric Illuminating Company of Boston et al., appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventeenth day of April, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed April 26, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

No. 919

In the Supreme Court of the United States

October Term, 1950

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM H. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PETITIONERS

AND

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.

v.

GEORGE P. DAVIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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139219—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, PETITIONERS

AND

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.

v.

GEORGE P. DAVIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue and the Collector of Internal Revenue for the District of Massachusetts, prays that a writ of certiorari issue to review the ~~case on April 14, 1937, reversing the~~ judgment of the Circuit Court of Appeals for the First Circuit entered in the above case on April 16, 1937, reversing the judgment of the District Court for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 19–22) is reported in 18 F. Supp. 1. The opinion of the Circuit Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 14, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tax imposed upon employers by Section 804 of the Social Security Act is within the power of Congress under the Constitution.

2. Whether the validity of the tax imposed upon employees by Section 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution.

STATUTE INVOLVED

Titles VIII and II of the Social Security Act appear in the Appendix, *infra,* pp. 7–21.

STATEMENT

On November 17, 1936, the respondent, George P. Davis, a stockholder in The Edison Electric Illuminating Company of Boston, filed a bill in equity against his corporation in the United States District Court for the District of Massachusetts.

He alleged that the taxes imposed by Section 801 (collection of which is provided for in Section 802) and Section 804 of the Social Security Act are unconstitutional; that he had so advised the defendant corporation; that the corporation nevertheless proposed to make the payments required by those Sections; and that further appeals to the defendant or its officers would be useless. And after an allegation of threat of irreparable injury, he prayed that the corporation be enjoined from making the aforesaid payments and that "Sections 802 and 804 be held to be not an Act of the Congress within its powers under the Constitution of the United States * * *" (R. 2–5).

The defendant corporation filed its answer on November 25, 1936 (R. 6–7).

Thereupon, the United States Commissioner of Internal Revenue and the United States Collector of Internal Revenue for the District of Massachusetts, the petitioners herein, sought, and on November 30, 1936, were permitted to intervene as defendants (R. 9–12). Once admitted, the intervening defendants filed two pleadings. The first was a motion to strike so much of the bill as related to the tax upon employees (Section 801) on the ground that the defendant employer, not being subject to tax under those provisions does not have any standing to challenge the validity of that tax, and that the plaintiff stockholder whose rights are no greater than those of his corporation has even less

standing to assail its validity (R. 12). The second was an answer which (1) restated the point raised in the motion to strike, (2) denied that the taxes imposed by Title VIII are unconstitutional, and (3) averred that the bill sets forth no facts which, if true, would entitle the plaintiff to the relief prayed for (R. 13–18).

The District Court concluded that the tax upon employees was not properly in issue and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction and dismissed the bill (R. 22). The Circuit Court of Appeals reversed, Judge Bingham dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the tax imposed upon employees by Section 801 is in issue in this case.

2. In holding that the tax imposed upon employees by Section 801 is invalid.

3. In holding that the tax imposed upon employers by Section 804 is invalid.

4. In reversing the judgment of the District Court.

REASON FOR GRANTING THE WRIT[1]

The question presented is of great fiscal importance to the Treasury of the United States. The taxes held by the lower court to be unconstitu-

[1] The validity of the taxes imposed by Section 901 of the Social Security Act is now before this Court in *Chas. C. Steward Machine Co.* v. *Davis*, No. 837.

tional are payable monthly (see Regulations 91, Articles 401, 410). This revenue is paid into the general treasury as internal revenue collections at the rate of over $40,000,000 a month. The existence of the lower court decision is likely to result in a multiplicity of suits harassing the Government in its effort to enforce the statute. Further, if collections continue and the taxes be declared invalid, the administrative burden of making refunds would be staggering.

The issues involved are of great public importance because the taxes imposed by Sections 801 and 804 and held to be unconstitutional below are being collected from more than 26,000,000 employees and 2,700,000 employers.

The Government has already expended upwards of 10 million dollars and it is expected that at least 5 million dollars more will be expended before the end of this fiscal year to perfect the appropriate administrative machinery to deal with these taxes and to accomplish the purposes of the Act. Upwards of 26 million persons have registered for prospective benefits. A prompt decision is therefore of the highest importance.

The Circuit Court of Appeals for the Second Circuit in *Norman* v. *Consolidated Edison Co. of New York,* decided April 12, 1937, where the point was urged by the Government as well as by the defendant corporation, held that the stockholder's action is not an appropriate one for the determina-

tion of the constitutionality of this statute. The contention, however, with respect to the tax upon employers was not made below in this case, and as was done in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 469, 554, it is waived here so far as it is in the power of Government officers so to do.

In view of the pressing importance of this case, petitioners respectfully request, if the petition is granted, that the Court set the case for argument in the second week of the coming session of this term of Court.

The Edison Electric Illuminating Co. of Boston and George P. Davis, the other parties in this case, have, through their counsel, authorized the Solicitor General to state that they do not oppose the granting of the writ, or the setting of an early date for argument in this case.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1937.

APPENDIX

SOCIAL SECURITY ACT OF AUGUST 14, 1935, C. 531, 49 STAT. 620

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

INCOME TAX ON EMPLOYEES

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum. (U. S. C., Sup. II, Title 42, Sec. 1001.)

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DEDUCTION OF TAX FROM WAGES

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer. (U. S. C., Sup. II, Title 42, Sec. 1002.)

DEDUCTIBILITY FROM INCOME TAX

SEC. 803. For the purposes of the income tax imposed by Title I of the Revenue Act of 1934 or by any Act of Congress in substitution therefor, the tax imposed by section 801 shall not be allowed as a deduction to the taxpayer in computing his net income for the year in which such tax is deducted from his wages. (U. S. C., Sup. II, Title 42, Sec. 1003.)

EXCISE TAX ON EMPLOYERS

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936,

with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum. (U. S. C., Supp. II, Title 42, Sec. 1004.)

ADJUSTMENT OF EMPLOYER'S TAX

SEC. 805. If more or less than the correct amount of tax imposed by section 804 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer. (U. S. C., Sup. II, Title 42, Sec. 1005.)

REFUNDS AND DEFICIENCIES

SEC. 806. If more or less than the correct amount of tax imposed by section 801 or 804 is paid or deducted with respect to any wage payment and the overpayment or underpayment of tax cannot be adjusted under section 802 (b) or 805 the amount of the overpayment shall be refunded and the

amount of the underpayment shall be collected, in such manner and at such times (subject to the statutes of limitations properly applicable thereto) as may be prescribed by regulations made under this title. (U. S. C., Sup. II, Title 42, Sec. 1006.)

COLLECTION AND PAYMENT OF TAXES

SEC. 807. (a) The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. If the tax is not paid when due, there shall be added as part of the tax interest (except in the case of adjustments made in accordance with the provisions of sections 802 (b) and 805) at the rate of one-half of 1 per centum per month from the date the tax became due until paid.

(b) Such taxes shall be collected and paid in such manner, at such times, and under such conditions, not inconsistent with this title (either by making and filing returns, or by stamps, coupons, tickets, books, or other reasonable devices or methods necessary or helpful in securing a complete and proper collection and payment of the tax or in securing proper identification of the taxpayer), as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable with respect to the taxes imposed by this title.

(d) In the payment of any tax under this title a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. (U. S. C., Sup. II, Title 42, Sec. 1007.)

RULES AND REGULATIONS

SEC. 808. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title. (U. S. C., Sup. II, Title 42, Sec. 1008.)

SALE OF STAMPS BY POSTMASTERS

SEC. 809. The Commissioner of Internal Revenue shall furnish to the Postmaster General without prepayment a suitable quantity of stamps, coupons, tickets, books, or other devices prescribed by the Commissioner under section 807 for the collection or payment of any tax imposed by this title, to be distributed to, and kept on sale by, all post offices of the first and second classes, and such post offices of the third and fourth classes as (1) are located in county seats, or (2) are certified by the Secretary of the Treasury to the Postmaster General as necessary to the proper administration of this title. The Postmaster General may require each such postmaster to furnish bond in such increased amount as he may from time to time determine, and each such postmaster shall deposit the receipts from the sale of such stamps, coupons, tickets, books, or other devices, to the credit of, and render accounts to, the Postmaster General at such times and in such form as the Postmaster General may

by regulations prescribe. The Postmaster General shall at least once a month transfer to the Treasury as internal-revenue collections all receipts so deposited together with a statement of the additional expenditures in the District of Columbia and elsewhere incurred by the Post Office Department in performing the duties imposed upon said Department by this Act, and the Secretary of the Treasury is hereby authorized and directed to advance from time to time to the credit of the Post Office Department from appropriations made for the collection of the taxes imposed by this title, such sums as may be required for such additional expenditures incurred by the Post Office Department. (U. S. C., Sup. II, Title 42, Sec. 1009.)

PENALTIES

SEC. 810. (a) Whoever buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in this title or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device, prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, shall be fined not more than $1,000 or imprisoned for not more than six months, or both.

(b) Whoever, with intent to defraud, alters, forges, makes, or counterfeits any stamp, coupon, ticket, book, or other device prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, or uses, sells, lends, or has in his possession any such altered, forged, or counterfeited

stamp, coupon, ticket, book, or other device, or makes, uses, sells, or has in his possession any material in imitation of the material used in the manufacture of such stamp, coupon, ticket, book, or other device, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (U. S. C., Sup. II, Title 42, Sec. 1010.)

DEFINITIONS

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed by an individual who has attained the age of sixty-five;

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. (U. S. C., Sup. II, Title 42, Sec. 1011.)

TITLE II—FEDERAL OLD-AGE BENEFITS

OLD-AGE RESERVE ACCOUNT

SECTION 201. (a) There is hereby created an account in the Treasury of the United States to be known as the "Old-Age Reserve Account" hereinafter in this title called the "Account." There is hereby authorized to be appropriated to the Account for each fiscal year, beginning with the fiscal year ending June 30, 1937, an amount sufficient as an annual premium to provide for the payments required under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually. The Secretary of the Treasury shall submit annually to the Bureau of the Budget an estimate of the appropriations to be made to the Account.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the Account as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations may be acquired for the Account only on such terms as to provide an investment yield of not less than 3 per centum per annum.

(c) Any obligations acquired by the Account (except special obligations issued exclusively to the Account) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Account shall be credited to and form a part of the Account.

(e) All amounts credited to the Account shall be available for making payments required under this title.

(f) The Secretary of the Treasury shall include in his annual report the actuarial status of the Account. (U. S. C., Sup. II, Title 42, Sec. 401.)

OLD-AGE BENEFIT PAYMENTS.

SEC. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus.

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000.

(b) In no case shall the monthly rate computed under subsection (a) exceed $85.

(c) If the Board finds at any time that more or less than the correct amount has theretofore been paid to any individual under this section, then, under regulations made by the Board, proper ad-

justments shall be made in connection with subsequent payments under this section to the same individual.

(d) Whenever the Board finds that any qualified individual has received wages with respect to regular employment after he attained the age of sixty-five, the old-age benefit payable to such individual shall be reduced, for each calendar month in any part of which such regular employment occurred, by an amount equal to one month's benefit. Such reduction shall be made, under regulations prescribed by the Board, by deductions from one or more payments of old-age benefit to such individual. (U. S. C., Sup. II, Title 42, Sec. 402.)

PAYMENTS UPON DEATH

SEC. 203. (a) If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936.

(b) If the Board finds that the correct amount of the old-age benefit payable to a qualified individual during his life under section 202 was less than 3½ per centum of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which such 3½ per centum exceeds the amount (whether more or less than the correct amount) paid to him during his life as old-age benefit.

(c) If the Board finds that the total amount paid to a qualified individual under an old-age benefit

during his life was less than the correct amount to which he was entitled under section 202, and that the correct amount of such old-age benefit was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which the correct amount of the old-age benefit exceeds the amount which was so paid to him during his life. (U. S. C., Sup. II, Title 42, Sec. 403.)

PAYMENTS TO AGED INDIVIDUALS NOT QUALIFIED FOR BENEFITS.

SEC. 204. (a) There shall be paid in a lump sum to any individual who, upon attaining the age of sixty-five, is not a qualified individual, an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five.

(b) After any individual becomes entitled to any payment under subsection (a), no other payment shall be made under this title in any manner measured by wages paid to him, except that any part of any payment under subsection (a) which is not paid to him before his death shall be paid to his estate. (U. S. C., Sup. II, Title 42, Sec. 404.)

AMOUNTS OF $500 OR LESS PAYABLE TO ESTATES

SEC. 205. If any amount payable to an estate under section 203 or 204 is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity

of compliance with the requirements of law with respect to the administration of such estate. (U. S. C., Sup. II, Title 42, Sec. 405.)

OVERPAYMENTS DURING LIFE

SEC. 206. If the Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was more than the correct amount to which he was entitled under section 202, and was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then upon his death there shall be repaid to the United States by his estate the amount, if any, by which such total amount paid to him during his life exceeds whichever of the following is the greater: (1) Such 3½ per centum, or (2) the correct amount to which he was entitled under section 202. (U. S. C., Sup. II, Title 42, Sec. 406.)

METHOD OF MAKING PAYMENTS

SEC. 207. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this title, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department, and prior to audit or settlement by the General Accounting Office, shall make payment in accordance with the certification by the Board. (U. S. C., Sup. II, Title 42, Sec. 407.)

ASSIGNMENT

SEC. 208. The right of any person to any future payment under this title shall not be transferable

or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. (U. S. C., Sup. II, Title 42, Sec. 408.)

PENALTIES

SEC. 209. Whoever in any application for any payment under this title makes any false statement as to any material fact, knowing such statement to be false, shall be fined not more than $1,000 or imprisoned for not more than one year, or both. (U. S. C., Sup. II, Title 42, Sec. 409.)

DEFINITIONS

SEC. 210. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(c) The term "qualified individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year. (U. S. C., Sup. II, Title 42, Sec. 410.)

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No. 910

In the Supreme Court of the United States

OCTOBER TERM, 1936

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM E. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, AND THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, ET AL., PETITIONERS,

v.

GEORGE P. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS HELVERING AND WELCH

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 910

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, AND THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL., PETITIONERS

v.

GEORGE P. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS HELVERING AND WELCH

OPINIONS BELOW

The opinion of the District Court is reported in 18 F. Supp. 1. The opinion of the Circuit Court of Appeals for the First Circuit (R. 26–31) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on April 14, 1937 (R. 31). The petition for a writ of cer-

certiorari was filed on April 20, 1937, and was granted on April 26, 1937 (R. 33). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tax imposed upon employees by Section 801 of the Social Security Act is in issue in this case.

2. Whether the tax imposed upon employees by Section 801 is a valid exercise of the power of Congress under Article I, Section 8, Clause 1 of the Constitution.

3. Whether the tax imposed upon employers by Section 804 is a valid exercise of the power of Congress under Article I, Section 8, Clause 1 of the Constitution.

4. Whether a taxpayer under Title VIII has a standing to question the old age benefits provided for in Title II of the Social Security Act.

5. Whether the provision made in Title II of the Social Security Act for old age benefits is a valid exercise of the power of Congress under Article I, Section 8, Clause 1 of the Constitution.

6. Whether, if they be taken together, the taxes imposed by Title VIII of the Social Security Act and the old age benefits contemplated by Title II of the Social Security Act constitute an exercise of powers not granted to Congress.

7. Whether the taxes imposed by Title VIII violate the Fifth Amendment.

STATUTE INVOLVED

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, U. S. C., Supp. II, Title 42, c. 7) is divided into eleven independent titles, many of which might well have been enacted as separate statutes. For the convenience of the Court, the entire Act is set forth in the Appendix, pp. 1–63.

Of the eleven titles only two (Titles VII and XI) are of general application to the entire Act. Title VII provides for the creation of a Social Security Board to perform such functions as may be imposed upon it by other parts of the Act. Title XI consists of general provisions such as certain basic definitions, provision for administrative rules and regulations, a separability clause, a reservation of the right to alter, amend, or repeal any provision of the Act, and finally, a section giving the Act its name, the "Social Security Act."

In this proceeding Title VIII alone, of the substantive titles, can impinge upon respondent's stock equity. No other title can possibly be involved unless it be Title II, which authorizes appropriations and provides terms for benefit payments to individuals.

Title VIII

Title VIII imposes two distinct types of taxes, each beginning in the calendar year 1937.

It imposes upon *employers, excise* taxes with respect to having individuals in their employ, meas-

ured by wages paid during the calendar year [Section 804]. It also imposes upon *employees, income* taxes measured by wages paid to them during the calendar year [Section 801].

Neither tax is applicable to certain types of employment, such as agricultural labor, domestic service, service for the national or state governments, and services performed by individuals who have attained the age of 65 years. Section 811 (b).

Both the employers' excise tax and the employees' income tax are at the same rate. Sections 801, 804. For the years 1937 to 1939, inclusive, the rate for each tax is fixed at 1 percent. Thereafter the rate increases ½ of 1 percent every 3 years, until, after December 31, 1948, the rate for each tax reaches 3 percent. In the computation of each tax there is required to be included all that the employer pays the employee, except that there need not be included whatever in excess of $3,000 is payable by any one employer to any one of his employees in one year. Section 811 (a).

The tax imposed on employees by Section 801 is collected by the employer of the taxpayer by deducting the amount of the tax from the employee's wages. Section 802 (a). Each employer is made liable for the payment of his employees' taxes, but is indemnified against the claims and demands of any person for the amount of any such payment. *Ibid.*

The proceeds of both taxes are required to be paid into the Treasury of the United States as in-

ternal revenue collections, and neither tax is earmarked in any way. Section 807.

Mechanically, as to payment, filing returns, penalties, and the like, Title VIII operates in the manner customarily employed in internal revenue legislation. *Ibid.*

TITLE II

Title II relates to Old Age Benefits. These are gratuities (not based on contract, but based on a Congressional direction expressly subject to amendment or repeal [Section 1104]), to be paid by the national government directly to individual persons.[1] The Title states to whom benefits are

[1] This Title should be sharply distinguished from Title I, which provides subventions to *States* in aid of, and to match, state expenditures for aged persons. This Title I authorizes Congress to appropriate not to exceed fifty million dollars for the fiscal year 1935–36 and "an amount sufficient" for subsequent years for federal aid to the states for old age assistance. Old age assistance is defined as public aid extended to "needy individuals" who are above sixty-five years of age and who are not inmates of any public institution.

The federal aid to any State for this purpose is limited to 50 percent of the total expenditures for old age assistance by the State and its political subdivisions and to not more than $15 per month for any individual who is given assistance. This aid must be expended exclusively for the actual payment of old age assistance, but, in addition, aid equal to 5 percent of such federal grants for old age assistance is allotted to the States for the administration of such assistance.

Grants under this title are to be made only to States which have a state plan for old age assistance which the Social Security Board finds conforms with standards set forth in the federal act. Section 2, Appendix, p. 2–3.

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to be paid and how they are to be measured. It also states what methods are to be utilized in preparing for, and in actually making, benefit payments under this Title. It does not endeavor to particularize any funds in the Treasury as the source of appropriations for benefit payments.

A. DESCRIPTION OF BENEFITS

Title II provides for two general types of benefits, each to be given directly by the national government to individual persons: one, monthly pensions; the other, lump sum payments. Viewed in the light of the legislative history of the Social Security Act, as well as the anticipated operation of the statute, the monthly pensions or benefits are by far the more important. Furthermore, the monthly pensions will be paid more frequently and will involve a much larger distribution of money than the lump sum payments.[2]

Before describing either general type of benefit, we note that in the computation of each there enters the element of wages. But, as used in these computations, "wages" *never* include: (1) wages paid prior to January 1, 1937 [Sections 202, 203, 204]; (2) whatever in excess of $3,000 one employer pays to any one of his employees in one year [Section 210 (a)]; (3) wages paid after a man reaches 65 [Sections 202 and 204]; and (4) wages paid for agricultural labor, domestic service, serv-

[2] See Appendix, pp. 78–79, Tables 14, 15.

ice for the national or state governments, and service in a few other excluded employments [Section 210 (b)].

The principal type of benefit, as we have just indicated, is *a monthly pension* or benefit paid to a person after he has attained the age of 65 [Section 202]. This benefit is available only to one (a) who has worked for at least one day in each of at least 5 separate years since December 31, 1936 [Sections 202 (a) and 210 (c)], (b) who has earned at least $2,000 since December 31, 1936 [*ibid.*], and (c) who is not then receiving "wages with respect to regular employment" [Section 202 (d)]. The benefit is measured by a percentage of the "wages" that have been paid to the beneficiary in employment covered by the Title [Sections 202, 210]. The percentage is not uniform for all wages, but is on a descending or degressive scale [Section 202 (a)]. Moreover, there is a top limit of $85 to these monthly pensions. These limitations, taken together with the second limitation mentioned in the preceding paragraph, make it certain that the monthly pensions paid to aged persons will be conservative in amount.[3]

In addition to monthly pensions, provision is also made for "lump sum payments" which are of inci-

[3] See footnote 1, p. 80, *infra*. The House Committee on Ways and Means, 74th Cong., 1st Sess., in its report on the bill which became the Social Security Act, Report No. 615, p. 6, included a table to illustrate monthly Old Age Benefits under Title II. See Appendix, p. 64, Table 1, p. 78, Table 14.

dental significance. These payments are made in four situations:

(1) If through an administrative error or delay a person who is receiving a monthly pension dies before he receives the correct amount, the amount which should have been paid to him is paid in a lump sum to his estate [Section 203 (c)].

(2) If a person who has earned wages in each of at least five separate years since December 31, 1936, and who has earned in that period more than $2,000, dies *after* attaining the age of 65, but before he has received in monthly pensions an amount equal to 3½ percent of the "wages" paid to him between January 1, 1937, and the time he reaches 65, then there is paid in a lump sum to his estate the difference between said 3½ percent and the total amount paid to him during his life as monthly pensions [Section 203 (b)].

(3) If a person who has earned wages since December 31, 1936, dies *before* attaining the age of 65, then there is paid to his estate 3½ percent of the "wages" paid to him between January 1, 1937, and his death [Section 203 (a)].

(4) If a person has, since December 31, 1936, earned wages in employment covered by Title II, but has attained the age of 65 either without working for at least one day in each of 5 separate years since 1936, or without earning at least $2,000 between January 1, 1937, and the time he attains 65, then there is paid to him [or to his estate, Section 204 (b)], a lump sum equal to 3½ percent of

the "wages" paid to him between January 1, 1937, and the time he attained 65 [Section 204 (a)].

B. DESCRIPTION OF THE ADMINISTRATIVE METHODS UTILIZED IN PREPARING FOR, AND IN MAKING, OLD AGE BENEFIT PAYMENTS UNDER TITLE II

We now turn to the source of Old Age Benefits paid under Title II.

These benefits are not paid from the taxes collected under Title VIII, except in the sense that all governmental expenses are paid out of all governmental receipts. Collections under Title VIII are not earmarked for any special purpose. [Section 807 (a).]

These benefits are not directly and immediately (but only indirectly and ultimately) paid out of the taxes, loans, and miscellaneous receipts which constitute the general fund of the Treasury. The benefits are paid directly and immediately out of a special account known as the "Old-Age Reserve Account", created in the Treasury of the United States by Section 201.[4]

This Account receives its funds out of the general fund of the Treasury, and then only when Congress so directs by an appropriation act.[5] No ap-

[4] That all Old Age Benefits are to be paid from this Account is indicated by Section 201 (b) and (e) of the Social Security Act, as well as by the "First Deficiency Appropriation Act, Fiscal Year 1936", Act of June 22, 1936, c. 689, 49 Stat. 1597, 1635.

[5] See Testimony of Daniel W. Bell, Assistant to the Secretary of the Treasury, and Acting Director of the Budget, in

propriation was contained in the Social Security Act itself. The Congressional direction has been embodied, and will be embodied, in annual appropriation acts.[6] The annual appropriation acts, however, have followed and presumably will follow the authority conferred by Section 201 (a) of the Social Security Act, which is printed in the margin.[7] The effect of that section is merely to permit the House of Representatives to consider an appropriation to the Account without the risk of being subject to a point of order.[8]

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the Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 75th Cong., 1st Sess., on the Treasury Department Appropriation Bill for 1938, p. 71.

[6] For example, for the current fiscal year it received 265 million dollars as a result of the "First Deficiency Appropriation Act, Fiscal Year 1936", Act of June 22, 1936, c. 689, 49 Stat. 1597, 1635.

[7] SECTION 201. (a) There is hereby created an account in the Treasury of the United States to be known as the "Old-Age Reserve Account" hereinafter in this title called the "Account." There is hereby authorized to be appropriated to the Account for each fiscal year, beginning with the fiscal year ending June 30, 1937, an amount sufficient as an annual premium to provide for the payments required under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually. The Secretary of the Treasury shall submit annually to the Bureau of the Budget an estimate of the appropriations to be made to the Account.

[8] Rule XXI, Clause 2, Jefferson's Manual and Rules of the House of Representatives.

Although Section 201 (a) of the Act gives the authority for, it does not place a *dollar* limit upon, annual appropriations. Instead it takes as the maximum limit for annual appropriations the standard of accepted actuarial principles.

However, no single standard of accepted actuarial principles was written into the Act.[9] Thus the Secretary of the Treasury and the Director of the Budget are free to recommend, and Congress is free

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[9] Section 201 authorizes a premium "determined on a reserve basis in accordance with accepted actuarial principles." *At least* three different formulae would seem to meet that test. (1) It would be in accordance with accepted actuarial principles to take a uniform or level or straight-line premium, so that each year there would be appropriated the same amount. The Government Actuary, Mr. R. R. Reagh, informs us that it is likely that this method would involve a premium of something over 1.8 billion dollars annually in perpetuity. There are variations in this theory, as well as in the estimates, under this principle.

(2) Or it would be in accordance with accepted actuarial principles to appropriate each year to the Account the amount necessary to put the Account in funds to meet all benefits which had accrued. Since benefits accrue at a more rapid rate in the first years of a man's employment [and since this approach would require funds sufficient to cover theoretically possible claims under Sections 203 (a) and 204, as well as under Section 202], this actuarial principle would, it has been estimated, involve an initial premium for the calendar year 1937 of 5 billion dollars. A. J. Altmeyer, Chairman, Social Security Board, Hearings Before the Committee on Finance, Senate, 75th Cong., 1st Sess., on S. Con. Res. 4 (Feb. 22, 1937), p. 3. Indeed, if a margin of safety is to be allowed, the initial premium for the calendar year 1937 might well be 6 billion dollars.

(3) Or it would be in accordance with accepted actuarial principles to appropriate each year the amount necessary so

to consider without being subject to a point of order, a bill drafted upon the basis of any accepted actuarial principles.[10] In point of fact, during the last two fiscal years,[11] the executive officers have recommended and Congress has considered only a proposal which appropriates to the Account the amount necessary so that at any time the Account will have on hand the difference between the then value of future benefit payments under Title II and the then value of future taxes under Title VIII. But, in the future, the executive officers are free to recommend, and the Congress is free to entertain without risk of a point of order, an ap-

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that at any time the Reserve Account will have on hand the difference between the then value of future benefit payments under Title II and the then value of future taxes under Title VIII. It is this third principle which Congress has, up to date, followed. Sen. Rep. No. 628, 74th Cong., 1st Sess., p. 9, their table IV. See testimony of Mr. Reagh, the Government Actuary, in the Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 75th Cong., 1st Sess., on the Treasury Department Appropriation Bill for 1938, p. 72, line 8, *et seq.*, p. 73.

[10] Witte, E. E., *Old Age Security in the Social Security Act*, Journal of Political Economy, Vol. 45, No. 1, p. 20 (Feb. 1937), suggests that Congress would be acting within the authority conferred by Section 201 if it appropriated to the Account only enough to meet benefit withdrawals in the ensuing year, since it involves a sum smaller than the maximum authorized by Section 201.

[11] "First Deficiency Appropriation Act, Fiscal Year, 1936", Act of June 22, 1936, c. 689, 49 Stat. 1597, 1635. H. R. 4720, 75th Congress, 1st Sess. "A Bill making Appropriations for the Treasury and Post Office Departments for the Fiscal Year ending June 30, 1938, and for other purposes." See also footnote 5, pp. 9–10, *supra*.

propriation bill drafted on the basis of entirely different "accepted actuarial principles." This implies a great latitude, as footnote 9 on pages 11–12, *supra,* indicates. The amount may vary by as much as 4½ billion dollars in a single year.

We have thus far been considering the possible annual appropriations under Title II in relation to possible annual collections under Title VIII in order to show that there is no immediate budgetary equivalence between the two titles. Whether, in the long run, there will be a budgetary equivalence between appropriations under Title II and tax receipts under Title VIII depends on so many varying factors, economic, social and political, that no one can make more than a guess. Quite apart from other factors, for instance, a change in average wage levels no greater than we have seen in the last decade might produce tax receipts some hundreds of million dollars a year in excess of the necessary appropriations. This and other variable items render any schedule of estimated appropriations, even assuming adherence to a particular actuarial theory, subject to wide and increasing margins of probable error.

In short, an examination of Section 201, and of the Social Security Act as a whole, discloses: first, that the benefits to be paid under Title II will not flow directly from the taxes collected under Title VIII, and, second, that the amount to be appropriated pursuant to the authority conferred under Title II is not certain to bear any immediate budg-

etary equivalence[12] to the taxes collected under Title VIII.[13]

STATEMENT.

On November 17, 1936, the respondent, George P. Davis, a stockholder in The Edison Electric Illuminating Company of Boston, filed a bill in equity against his corporation in the United States District Court for the District of Massachusetts. He alleged that the taxes imposed by Section 801 (collection of which is provided for in Section 802) and Section 804 of the Social Security Act are unconstitutional; that he had so advised the defendant corporation; that the corporation nevertheless proposed to make the payments required by those Sections; and that further appeals to the

[12] We have shown that because of the varying standards of appropriation possible under Section 201, there is no certainty how much Congress will appropriate pursuant to the authority there conferred. Of course, another reason why there is no such certainty is that future Congresses may not exercise to the full the authority conferred by the Seventy-Fourth Congress. No Congress is bound to make any appropriation. Thus there is a further support for our statement that there is no necessary immediate budgetary equivalence between Title II and Title VIII.

[13] We believe that the foregoing epitome of Title II covers every point that is of legal significance in this case. But, for the possible convenience of the Court, we have summarized in Appendix D: (1) the method to be followed by the Secretary of the Treasury in investing the funds in the Account while awaiting the presentation of Old Age Benefit claims; and (2) the economic and political considerations which led Congress to establish a reserve for future disbursements under Title II instead of relying upon a pay-as-you-go policy.

defendant or its officers would be useless. And after an allegation of threat of irreparable injury, he prayed that the corporation be enjoined from making the aforesaid payments and that "Sections 802 and 804 be held to be not an Act of the Congress within its powers under the Constitution of the United States * * *" (R. 2–5).

The defendant corporation filed its answer on November 25, 1936 (R. 6–7).

Thereupon, the United States Commissioner of Internal Revenue and the United States Collector of Internal Revenue for the District of Massachusetts, the petitioners herein, sought, and on November 30, 1936, were permitted to intervene as defendants (R. 9–12). Once admitted, the intervening defendants filed two pleadings. The first was a motion to strike so much of the bill as related to the tax upon employees (Section 801) on the ground that the defendant employer, not being subject to tax under those provisions, does not have any standing to challenge the validity of that tax, and that the plaintiff stockholder whose rights are no greater than those of his corporation has even less standing to assail its validity (R. 12). The second was an answer which (1) restated the point raised in the motion to strike, (2) denied that the taxes imposed by Title VIII are unconstitutional, and (3) averred that the bill sets forth no facts which, if true, would entitle the plaintiff to the relief prayed for (R. 13–18).

The District Court concluded that the tax upon employees was not properly in issue and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction and dismissed the bill (R. 22). The Circuit Court of Appeals reversed, Judge Bingham dissenting (R. 26–31).[14]

SUMMARY OF ARGUMENT

I

Both the income tax upon employees and the excise tax upon employers imposed by Title VIII are challenged in this proceeding. However, since the employer is merely a withholding agent with respect to the employee tax, it is clear that neither the corporation nor respondent stockholder may ask for relief against that tax, predicated upon its asserted invalidity.

But even if both taxes are properly in issue in this case, they will be found to be a valid exercise of the taxing power under the Constitution, Article I, Section 8, Clause 1. The employee tax is a special income tax (*cf. United States* v. *Hudson*, No. 97, January 11, 1937), and the employer tax is an excise. Both comply with the requirement of uni-

[14] The opinion of the Circuit Court of Appeals incorporates by reference much of its discussion in *Davis* v. *Boston & Maine R. Co.*, decided on the same day. For the convenience of the Court the latter opinion has been reprinted in the Appendix at pp. 80–143.

formity, since the rule of liability is the same throughout the United States.

These taxes are true taxes, their purpose being simply to raise revenue. No compliance with any scheme of Federal regulation is involved. The proceeds are paid unrestricted into the Treasury as internal revenue collections, available for the general support of the Government. Although Congress may have anticipated that over a period of years the taxes would roughly offset the drain upon the Treasury to be occasioned by the wholly independent appropriations authorized under Title II, such rough budgetary equivalence is not sufficient to deprive Title VIII of its quality as a true taxing measure.

II

To the extent that the Circuit Court of Appeals declared the expenditure under Title II as not being for the general welfare, it erred in undertaking at all to pass upon the validity of Title II. The rule of *Frothingham* v. *Mellon,* 262 U. S. 447, which denies a taxpayer the standing to question the propriety of any expenditures from the Federal Treasury, is applicable here. That rule has been relaxed only where the tax avails are earmarked for a specific purpose. It has never been thought that a mere rough budgetary relationship—such as nearly always exists between new taxes and new expenditures—is sufficient to justify a departure from the general rule. And it is clear herein, not

only that the avails of these taxes are not earmarked, but also that there is no exact equivalence between the anticipated revenues and expenditures.

III

The power of Congress to appropriate for the general welfare granted by Article I, Section 8, Clause 1 of the Constitution is a broad power not limited by or to the other enumerated powers of Congress. *United States* v. *Butler,* 297 U. S. 1. Whether any particular expenditure is for the general welfare is a matter completely within the determination of Congress. *United States* v. *Teller,* 107 U. S. 64, 68. In any event the decision of Congress is not reviewable by the courts if by any "reasonable possibility it is for the general welfare." *United States* v. *Butler,* 297 U. S. 1, 65.

The expenditures in the present case are clearly well within the limits of the power of Congress. The number of aged persons in this country is rapidly increasing; workers in urban industrialized civilization usually arrive at old age without adequate means for self-support, as is demonstrated not only by their earning powers during their working lifetime but by various studies which have been made of the extent of dependency of people over 65 years of age. Those who are able to call upon their children for support only aggravate the evil by depriving the younger members of the family of the resources which they

need. Voluntary industrial pension plans cover but a few. Private charity is inadequate to cope with the problem. Even state old age benefit laws present grave administrative and financial problems.

In the light of the above facts, we submit that there can be no doubt that the expenditures contemplated by Title II are for the general welfare of the United States.

Moreover, the form of the expenditures is soundly designed to promote general welfare. The statute excludes employed aged persons, thereby providing a simple and easily administered means test which is legally sufficient. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 230. The payments themselves are graduated both by wages and length of employment so as to provide an incentive to work, and at the same time roughly to relate benefits to past standards of living. The incidental lump sum payments under Sections 203 and 204 accord with the general purpose of the plan and also serve to simplify its administration. The exclusions from benefits are based upon sound administrative and economic reasons.

IV

Since Title VIII and Title II severally constitute valid exercises of Congressional power, they cannot be invalid when considered jointly. Even if it be said that the avails of the taxes are ear-

marked, that fact does not deprive the taxes of their quality as true taxes. Nor are the taxes any the less true taxes if it be said that the proceeds are earmarked for the payment of benefits to a particular group. If the payment of benefits under Title II is an expenditure for the general welfare, then a levy for the purpose of providing funds for such expenditure must *ipso facto* be a tax within the meaning of the Constitution. The determination that the expenditures are for the general welfare is a determination that they are for the benefit of the taxpayers as well as for the benefit of the direct recipients of the expenditures. It has never been supposed that a tax ceases to be one for the general welfare because the immediate application of the proceeds is to one group of the population. *Clark* v. *Poor*, 274 U. S. 554; *Gillum* v. *Johnson*, 62 P. (2nd) 1037, 1044 (Calif. Sup. Ct.); *Beeland Wholesale Grocery Co.* v. *Kaufman*, decided by the Supreme Court of Alabama, March 17, 1937. "The Constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the proceeds raised by taxation." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 268; *Carley & Hamilton* v. *Snook*, 281 U. S. 66; *Knights* v. *Jackson*, 260 U. S. 12, 15.

Titles II and VIII do not, when considered together, constitute a regulatory scheme. The Act does not require retirement from employment and has no significant tendency to induce it. The Act

cannot be said to constitute a plan for compulsory insurance within the accepted meaning of the term "insurance." Compare *Lynch* v. *United States,* 292 U. S. 571, 576–577. But whether or not the plan of the Act may properly be designated as old age insurance is immaterial, since it involves nothing more than a valid exercise of the taxing power and valid expenditures for the general welfare having no regulatory incidents. Compare *McCulloch* v. *Maryland,* 4 Wheat. 315. There is no enforced addition to wages and consequently the Act does not constitute a regulation of the wage relationship. The Tenth Amendment has no application, since Congress has only exercised its granted powers. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330. The tax and expenditures are not forbidden to the Federal Government merely because the States themselves might legitimately lay similar taxes and make similar expenditures. *Hoke* v. *United States,* 227 U. S. 308, 322.

For these reasons, the decisions in *United States* v. *Butler,* 297 U. S. 1, and *Railroad Retirement Board* v. *Alton R. R.,* 295 U. S. 330, have no application.

V

The taxes do not violate the Fifth Amendment. Not only are the various selections of employments for taxation well within the power of Congress

(*Sonzinsky* v. *United States,* No. 614, decided March 29, 1937), but they are of the type long sanctioned.

The provision limiting the amount of taxable wages to $3,000 is likewise valid. Congress has as full discretion in determining how far it will exercise the taxing power as it has in selecting the subjects for taxation. This provision will be found justified by precedent as well as by its reasonable tendency to avoid double taxation.

PRELIMINARY STATEMENT

This action was commenced in November 1936. The first tax became due March 1, 1937. Since it was apparent that at some time this tax would be subjected to a constitutional test the Government bent every effort toward an early determination in the hope of getting final decision before the due date of the tax. The case was submitted to the Circuit Court of Appeals after this Court denied certiorari in the companion case under the Social Security Act affecting taxes under Title IX (*Davis* v. *Boston & Maine Railroad,* certiorari denied Jan. 4, 1937). The routing through the Circuit Court of Appeals has thus necessarily delayed decision beyond the due date of the tax.

Each month of delay in a definite settlement of the constitutionality of Title VIII raises for the Government most serious budgetary, fiscal and administrative problems which are equally important

to the taxpayers. It is for this reason that the Government waives any technical objections whatever arising out of the stockholder's suit and desires to have a decision on the constitutionality of the statute and not merely on procedural points. The latter would leave the validity of the tax undecided and, under the shadow of the Circuit Court of Appeals' opinion, a multiplicity of litigations would be certain to result, as well as utter confusion in budgetary and fiscal matters, in tax collecting administration, and in the Social Security Board. The reasons which impelled us to waive objections to the form of the action, and impel us to waive them here, and to urge decision on the merits are as follows:

1. *Budgetary and Fiscal Reasons.*—Tax collections under this Title in the budget for the fiscal year 1938 are estimated at $253,300,000 for the fiscal year 1937, and at $621,800,000 for the fiscal year 1938. Congressional appropriations have been made and are being made in contemplation of such receipts. Brief experience indicates that the estimates are sound. Thus, there has been collected $19,444.25 during the month of January 1937, $13,908,989.67 during the month of February 1937, and $44,000,516.65 during the month of March 1937. These amounts represent both the employees' tax and the employers' tax under Title VIII of the Act.

If the constitutional question should be decided adversely to the government, Congress must not only find other sources of revenue to substitute therefor in appropriations already made and likely to be made but it must find revenue to provide for the refund of the collections under the Act, and the amount of interest thereon, which would be substantial and would increase with the delay in the decision.

Moreover, the decision as to the maturities of obligations to be issued by the Treasury in its future financing must of necessity be profoundly influenced by whether the taxes levied under Title VIII of the Social Security Act are valid. The aggregate receipts from Title VIII taxes during the next 5 fiscal years are roughly estimated at approximately 3 billions. During the succeeding 5 years these tax collections are estimated to be in excess of an additional 5 billions. It is contemplated that, since expenditures under the Social Security Act will not be equivalent to more than a small part of these collections, the great bulk of tax collections under Title VIII will be available for reductions in the aggregate amount of the public debt outstanding in the hands of the public. If the constitutionality of this tax is upheld it would obviously be desirable for the Treasury in its refunding and new borrowing operations to concentrate maturities very heavily during the period of large tax collections relative

to expenditures for old age benefits. On the other hand, if this Title is held to be unconstitutional, the Secretary of the Treasury will have to base his calculations on different factors.

2. *Administrative Reasons.*—Title VIII imposes the largest tax collecting task ever attempted by the United States Treasury. It requires 2,500,000 returns per month to be made by employers covering their own and their employees' taxes. This requires that the Bureau of Internal Revenue and the offices of collectors be geared to handle more than 2,500,000 returns per month with capacity for their receipt, listing for assessment and auditing. Machinery for ascertaining and requiring delinquent returns must be set in motion, involving the assertion of interest and penalties which may be legally due, and acting upon explanation of delinquency and adjusting offers in compromise where a tax has accrued and can not be paid. This machinery must be maintained if the tax is valid, and abandoned if the tax is not. It is of utmost importance that the government know which way it is to proceed.

In event that this tax is held unconstitutional, refunds will be in order to some 26 million employee taxpayers and approximately 2½ million employers. This would be the most stupendous refund program ever faced. It would require financing, verifications of claims, and computation of interest. The problem of so vast a number of

refunds to employees, most of them in small amounts, would have to be faced. The refunds probably could only be made to the employees, for many change places of employment and, in any event, the employer has been a mere agent for collection at the source.

3. *Effect of Period of Uncertainty.*—The tax under Title VIII now stands in a similar position to that which confronted the government in connection with the taxes imposed under the Agricultural Adjustment Act. The District Court for the District of Massachusetts upheld those taxes as it has upheld these. The Circuit Court of Appeals for the First Circuit reversed the lower court by a 2–1 decision as it has done here. Under that impetus an avalanche of suits, numbering approximately 2,000, seeking to restrain the collection of those taxes began to descend upon the Department of Justice and the various Collectors of Internal Revenue. The number of taxpayers under this Act is much greater than under the Agricultural Adjustment Act. It is not unlikely that, if a decision of this question be postponed until the next term, an unprecedented number of injunction suits will be commenced all over the United States.

It is safe to assume, furthermore, that many employers either with or without instituting action will cease filing returns or paying taxes, or both, unless there is an early decision by the Court, and

that number will increase with each month that passes before validity is determined. These delinquencies, in case the law is sustained, will create serious problems. In many cases employers may cease to deduct the tax from employees' wages.

If employers, financially able to institute and maintain legal proceedings in jurisdictions in which injunctions are granted, hinder the collection of taxes, they will thereby temporarily secure to themselves a competitive advantage over employers who cannot afford such proceedings or who are friendly to the purposes of the Act. Extensions of time will be sought, which the Commission has only limited authority to grant.

These disadvantages to the government are paralleled by equal disadvantages to the taxpayers. Some large concerns are installing or contemplating installation of additional accounting machinery to take care of the making of returns and keeping of the records necessary under the Act. Price levels for products have been or are being readjusted to include the tax. The economy of the country is adjusting itself to the distribution of this burden, and grave inequities will result if this process is allowed to continue in a period of uncertainty.

For these reasons the government feels compelled to waive any objection which it might have to the maintenance of this action. It is confronted by a condition and not a theory. This is not the

kind of statute in which evidence must be offered as to the operation of a particular industry or an effect of a statute as a basis for the Court's decision. This decision can be rendered just as intelligently upon the record in this case as upon the record in a refund case such as is now before the Court in No. 837, *Steward Machine Co.* v. *Davis.*

In the light of the above facts, the Government intervened in this proceeding and has, together with the corporate defendant, filed a petition for certiorari in an attempt to secure a decision on the merits of this case. We recognize, however, that there is a question with regard to the jurisdiction of this Court to pass upon the merits in this form of proceeding. Nevertheless, we believe that the Court can and should render a decision on the merits.

4. *Legal basis of jurisdiction.*—It may be objected that jurisdiction is lacking in this case for any one of the following three reasons: (1) there is no "case or controversy" within the meaning of Article III of the United States Constitution; (2) there are lacking the elements necessary for equity jurisdiction; and (3) R. S. Sec. 3224 operates to prevent this sort of suit. We believe that under the circumstances of this case none of these objections is tenable.

In answer to the objection that there is no "case or controversy" within the constitutional meaning of that phrase, we submit that, since the Collector is a defendant to the suit, and since both he and the

corporate defendant take a position adverse to that of the respondent, and since their adverse positions relate to a matter presently in controversy—to wit: the payment by the corporate defendant of taxes under Title VIII—there are present all the elements necessary to constitute a "case or controversy." *Cf. Aetna Life Insurance Co.* v. *Haworth*, No. 446, March 1, 1937.

In answer to the second objection, that is, that there are lacking the elements necessary to create a case within the equity jurisdiction of a court, we first note the exact nature of this objection. The objection, as *Norman* v. *Consolidated Gas Co.* (C. C. A. 2d, decided April 12, 1937) holds, is that if the shareholder waits until the corporation makes the tax payment and the corporation shows no disposition to seek a refund, then the shareholder has open to him a suit in equity to compel the corporation to seek from the Commissioner of Internal Revenue a refund in accordance with the provisions of the applicable statutes. In other words, it is said that there is lacking jurisdiction in equity at this moment, because there will be available in the future another adequate *equitable* remedy created since 1924.[14a] Although we agree with the Circuit Court of Appeals for the Second Cir-

[14a] The remedy of bringing suit to compel the corporation to seek a refund did not exist at the time this Court decided *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, and *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, since then no refund could be had if the corporations' original payment were voluntary.

cuit that the presence of this other equitable remedy is adequate and, like the presence of an adequate legal remedy, furnishes an appropriate ground for an equity court to refuse jurisdiction, it is a ground which, in our opinion, may be waived by all the parties[15]; and if waived in a lower court, cannot be raised in this Court.[16]

In answer to the third objection, that is, that

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[15] As this Court said in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500:

"• • • The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. *Smith* v. *McKay*, 161 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501. The objection may, as pointed out in *Reynes* v. *Dumont*, 130 U. S. 354, 395, be taken by the court of its own motion. But, unlike lack of jurisdiction as a federal court, *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382, lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject-matter of the suit is of a class of which a court of equity has jurisdiction. And where the defendant has expressly consented to action by the court or has failed to object seasonably, the objection will be treated as waived. *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 536; *Southern Pacific R. R. Co.* v. *United States* (No. 1), 200 U. S. 341, 349."

There can, of course, be no question that in a case like the present, in which a stockholder sues to enjoin a corporation from committing what he regards as a diversion of corporate assets, "the subject matter of the suit is of a class of which a court of equity has jurisdiction." *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

[16] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, at 554:

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as

R. S. Sec. 3224 prohibits a suit of this nature, our position is as follows: We agree that R. S. Sec. 3224 is intended to prevent equitable interference with the collection of Federal taxes by all devices, including the medium of a stockholder's suit in equity against a corporation to enjoin payment. However, we believe that this objection may be waived by an appropriate officer of the United States. See *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 554; *Hill* v. *Wallace*, 257 U. S. 615. We believe that such waiver is certainly within the power of the appropriate officers of the Government in a case like the present. Section 3224 was enacted to promote, not to discourage, the orderly administration and collection of Government revenues. Where, in the judgment of the appropriate officers, the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund, the officers should be permitted to waive the objections which Section 3224 authorizes them to raise.

ARGUMENT

I

TITLE VIII IS A VALID EXERCISE OF THE POWER TO TAX CONFERRED ON CONGRESS BY ARTICLE I, SECTION 8, CLAUSE 1

Title VIII imposes two taxes. The first is an *excise* upon employers measured by a fixed per-

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it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was

centage of wages paid. Section 804. The second is an *income* tax upon employees measured by a fixed percentage of wages received [Section 801], and the duty of collecting this tax is placed upon the employer who is required to deduct it from wages paid [Section 802]. The respondent stockholder assails both taxes as invalid.

Respondent, however, is not entitled to any relief with respect to the employee tax. That tax is not imposed on his corporation, but is merely a withholding at the source, the employer being merely a collecting agent or stakeholder. The withholding provisions themselves are not challenged, nor could they be successfully attacked. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 21; *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137; *Bell's Gap R'd Co. v. Pennsylvania,* 134 U. S. 232, 239.[16a] The complaint is that the employee tax itself is invalid. But the employer, as stakeholder, has no *locus standi* to challenge this tax. *United States* v. *American Exchange Irving Trust Co.,* 43 F. (2d)

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in respect of voluntary action by the defendant company and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits."

[16a] The withholding provisions herein are even less open to challenge than those approved in the above cases. The employer is completely protected by Section 802 (a), which provides:

"Every employer required so to deduct the tax * * * is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer."

829 (S. D. N. Y.);[17] *United States* v. *First Capital National Bank of Iowa City* (C. C. A. 8th), March 31, 1937. See also *Miami Valley Fruit Co.* v. *United States,* 45 F. (2d) 303 (C. C. A. 5th), certiorari denied, 283 U. S. 841; *United States* v. *Erb,* 8 F. Supp. 947 (S. D. N. Y.).

The corporation "can complain only of the infringement of its own constitutional immunity, not that of its employees." *Virginian Ry. Co.* v. *System Federation No. 40,* No. 324, March 29, 1937. "No employé is complaining of this act in this case." *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576. See also *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 697; *Rail Coal Co.* v. *Ohio Industrial Comm.,* 236 U. S. 338, 349; *Hawkins* v. *Bleakly,* 243 U. S. 210, 214. Accordingly, respondent stockholder, whose rights cannot be any greater than those of his corporation, may not ask for any relief against the tax on employees imposed by Section 801.

But, even if both taxes be examined, they will be found to be well within the ambit of Federal power. Title VIII is a valid exercise of the power "To lay and collect Taxes, Duties, Imposts and Excises, to

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[17] In the *American Exchange Irving Trust Co.* case, the Government levied upon a taxpayer's bank deposit. The bank, although admitting the deposit, denied the depositor's tax liability to the Government. The court rejected that defense (p. 831):

"* * * the present suit is against third parties who do not stand in the shoes of the taxpayer, and are therefore not permitted to set up defenses ordinarily available to taxpayers in actions brought against them to recover taxes."

pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Art. I, Sec. 8, cl. 1. The authority so conferred "is exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 12.

The taxes imposed are true taxes. Both in form and substance they have all the indicia of and operate as a revenue measure. The statute originated in the House of Representatives,[18] and hearings were held by the House Committee on Ways and Means and the Senate Committee on Finance. The Bureau of Internal Revenue, under the direction of the Secretary of the Treasury, is charged with the duty of collection, and administrative provisions generally found in revenue measures relating to interest, penalties, and the like are also present here. Section 807.

The employee tax [Section 801] is an income tax with respect to services rendered, measured by wages received. Such a tax on income has always been considered within the power of Congress and not subject to the requirement of apportionment. *Springer* v. *United States*, 102 U. S. 586; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 579. Any doubt that may possibly have existed on this question has been removed by the Sixteenth Amendment. Nor is it material that this

[18] The bill which was finally enacted was introduced in the House as H. R. 7260 on April 4, 1935, 74th Cong., 1st Sess.

is a "special income tax", imposed separately from and in addition to the general income tax law. *United States* v. *Hudson*, No. 97, decided January 11, 1937.

The employer tax [Section 804] is an excise, the incidence of which can be considered either on the receipt of services or on the exercise of the privilege of employing individuals. That such a tax is a true excise is clearly apparent from the discussion of authorities in Appendix C to the Government's brief in *Chas. C. Steward Machine Co.* v. *Davis*, No. 837, to which we respectfully refer the Court. But whether an excise or not, the levy on employers is in form, at least, undeniably a tax, and it does not matter what it is called in the statute. *Barwise* v. *Sheppard*, 299 U. S. 33, 36.

Neither of these taxes violates the test of "uniformity" in Article I, Section 8, Clause 1. That requirement is merely one of *geographical* uniformity. It is not, as respondent argues (Br. 40–46), a rule of *intrinsic equality*. The canon of uniformity is satisfied if "the rule of liability shall be the same in all parts of the United States." *Florida* v. *Mellon*, 273 U. S. 12, 17; *Knowlton* v. *Moore*, 178 U. S. 41, 83–108; *Poe* v. *Seaborn*, 282 U. S. 101, 117–118; *Bromley* v. *McCaughn*, 280 U. S. 124, 138.

The imposition of these taxes is a true exercise of the Federal taxing power. Their purpose is simply to raise revenue. Wholly unlike the exactions considered in the *Child Labor Tax Case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, these taxes are not designed to and do not obtain com-

pliance with a scheme of Federal regulation. Since they could not be considered to be part of a regulatory scheme, these taxes are not comparable to the tax invalidated in *United States* v. *Butler*, 297 U. S. 1. Of the tax there involved, the Court said (p. 59):

> The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the "current average farm price" and "fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it.

Thus, entirely apart from the fact that the proceeds were deemed to regulate agricultural production, the tax itself was regarded as a device calculated to control production and prices of agricultural commodities.

The taxes imposed by Title VIII can not have, nor were they intended to have, any regulatory effect. They simply raise revenue, which is paid unrestricted into the Treasury as internal revenue collections. Section 807. Congress anticipated that large sums would be collected.[19] And although

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[19] The combined yield of the two taxes was, at the time of the passage of the Act, expected to be $278,800,000 for the fiscal year 1937 (the taxes being operative during only one-half of that year, since they were to go into effect for the first time on Jan. 1, 1937); $560,200,000 for the fiscal year 1938; $714,600,000 for the fiscal year 1940; $1,028,800,-

the taxes for the first month were not due until March 1, 1937,[20] collections through March 31, 1937, have reached $57,928,950.57.

Nor is the quality of Title VIII as a taxing measure destroyed by the fact that Congress anticipated making large future expenditures out of the general treasury for the purposes enumerated in Title II, and that the taxes collected would operate to relieve the drain to be occasioned by such expenditures.

The constitutional validity of a tax is not affected by the fact that it was imposed because anticipated expenditures made it necessary to raise funds. It has long been recognized that "Taxation may run *pari passu* with expenditure". *Patton* v. *Brady*, 184 U. S. 608, 620. Cf. *Knights*

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000 for the fiscal year 1943; $1,359,400,000 for the fiscal year 1946; and $1,706,300,000 for the fiscal year 1949. See S. Rep. No. 628, 74th Cong., 1st Sess., p. 26; H. Rep. No. 615, 74th Cong. 1st Sess., p. 15. Since the passage of the Act, somewhat higher estimates have been made. Thus in the Annual Report of the Secretary of the Treasury for the fiscal year 1936, p. 44, it is estimated that for the fiscal year 1938 the taxes imposed by Title VIII will yield $622,000,000.

[20] The taxes are operative only with respect to wages paid after December 31, 1936. Sections 801, 804. Payments are due monthly with returns. Regulations 91, Articles 410, 401. And pursuant to Regulations 91, Article 409, returns must be filed on or before the last day of the first month following the period for which they are made. Thus, returns for January 1937 would be due on Feb. 28, 1937; but since Feb. 28, 1937, fell on Sunday, the returns and payments were not due, in accordance with Article 409, until March 1, 1937.

v. *Jackson,* 260 U. S. 12, 15; *Carley and Hamilton* v. *Snook,* 281 U. S. 66. Thus it is inconceivable that the Revenue Act of 1936 could fail as an exercise of the taxing power even to the extent that it raises more revenue than its predecessors, by reason of the fact that it was enacted to provide funds for the soldiers' bonus under the Adjusted Compensation Payment Act of 1936, c. 32, 49 Stat. 1099, and for expenditures under the Soil Conservation and Domestic Allotment Act, c. 104, 49 Stat. 1148. See H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 1–3; S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 1–3. Cf. *Knights* v. *Jackson, ubi supra.*

Indeed, not only is it generally recognized that there may be a proper relationship between anticipated expenditures and taxation, but some urge that they should always be considered together. Cf. Report of the Select Committee on the Budget of the House of Representatives, H. Rep. No. 14, 67th Cong., 1st Sess. And it has been the uniform practice in both the House and the Senate to consider the financial needs of the Government in the preparation of revenue bills.[21] The Budget and Accounting Act of

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[21] See House Hearings on H. R. 12395, 74th Cong., 2d Sess., p. 1, Revenue Act of 1936; Senate Hearings, p. 1, Revenue Act of 1936; House Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 1, Revenue Act of 1934; House Hearings on H. R. 10236, 72d Cong., 1st Sess., p. 1, Revenue Act of 1932; Senate Hearings, p. 1, Revenue Act of 1932; House Hearings on H. R. 1, 70th Cong., 1st Sess., p. 1, Revenue Act of 1928; Senate Hearings, p. 269, Revenue Act of 1928;

June 20, 1921 (c. 18, 42 Stat. 20, 21), provides that if the estimated receipts are less than the estimated expenditures for the ensuing fiscal year, the President in the Budget shall make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.

The fact that the employee taxpayer will later be the recipient of benefits under Title II does not deprive either the employer tax or the employee tax of its quality as a true tax. "It would be difficult indeed to arrange public affairs in such fashion that no economic benefits would accrue to taxpayers as a result of the expenditures of tax collections." Haig, 14 Encyclopedia of Social Sciences 531, 536.[22] See also *id.*, p. 532.

Accordingly, Title VIII is a valid exercise of the taxing power; the taxes comply with the various applicable constitutional limitations; they are true

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House Hearings, on H. R. 1, 69th Cong., 1st Sess., p. 1, Revenue Act of 1926; Senate Hearings, p. 1, Revenue Act of 1926; House Hearings on H. R. 6715, 68th Cong., 1st Sess., p. 317, Revenue Act of 1924; Senate Hearings, pp. 1, 39, Revenue Act of 1924; House Hearings, Executive Session, on H. R. 8245, 67th Cong., 1st Sess., p. 384, Revenue Act of 1921; Senate Hearings, letter from the Secretary of the Treasury, p. 7, Revenue Act of 1921; House Hearings on H. R. 12863, 65th Cong., 3d Sess., pp. 9, 13, Revenue Act of 1918.

[22] Haig also calls attention to "the enormous development of governmental functions which has come about, resulting in traceable benefits and forming the foundation for the modern demand that specially benefited individuals and classes should assume some degree of responsibility for the costs involved." *Id.*, p. 539.

taxes, having no regulatory purpose or effect; they were designed to and actually do raise revenue in substantial amounts which is paid unrestricted into the Treasury of the United States.

II

THE APPROPRIATIONS AUTHORIZED BY TITLE II MAY NOT BE CHALLENGED BY A TAXPAYER UNDER TITLE VIII

The Circuit Court of Appeals held that a tax for the old age benefits provided for in Title II "cannot be said to be imposed for the general welfare of the United States and the taxes under Title VIII would fail for this reason" (R. 28). It is our position that a taxpayer under Title VIII has no standing to challenge the constitutionality of Title II, and that the court below erred in undertaking to pass upon it. The taxes are paid into the Treasury completely unrestricted, and are subject to call for the general support of the Government. We do not deny that the taxes imposed by Title VIII were intended roughly to relieve the drain on the Treasury to be occasioned in the future by Title II. But we do say that such a rough budgetary correspondence—a correspondence that may and probably will fail to achieve even approximate mathematical equivalence (see pp. 9–14, *supra*)—is not sufficient to entitle a taxpayer to challenge these proposed expenditures.

A taxpayer of the United States may not attack the expenditure of funds from the Federal Treasury. *Frothingham* v. *Mellon,* 262 U. S. 447;

Wheless v. *Mellon*, 10 F. (2d) 893 (App. D. C.), certiorari denied, 269 U. S. 560. While that rule has been relaxed where the avails of the tax are earmarked for a specific purpose (*United States* v. *Butler*, 297 U. S. 1), no such circumstances are present here to justify a departure from the general rule.

The operation of the taxes under Title VIII is in no way conditioned upon the expenditures provided for in Title II. The rates of tax are fixed, and the proceeds are commingled in the general Treasury. And no money which has been covered into the Treasury can be paid out except pursuant to an appropriation (Const., Art. I, Sec. 9, cl. 7). But Title II does not contain any appropriation, it merely *authorizes* appropriations. Future acts of Congress are necessary to make the appropriations, and when they are made, they will derive their vitality from such acts of Congress rather than from Title II. Thus, the first appropriation contemplated by Title II was made by the Act of June 22, 1936, c. 689, 49 Stat. 1597, 1635. In making subsequent appropriations, future Congresses may or may not elect to follow the provisions of Title II. See Witte, *Old Age Security in the Social Security Act*, 45 Journal of Political Economy 1, 15, 17, 19, 20. A future Congress may not even make any appropriation in a given year. Yet the taxes imposed by Title VIII continue.

But even if future Congresses should stay within the provisions of Title II, the expenditures ac-

tually made for the specified benefits would have no mathematical equivalence to the taxes collected. Thus, it is expected that $253,000,000 will be realized under Title VIII for the fiscal year 1937. See Hearing before Subcommittee of the House Committee on Appropriations, 75th Cong., 1st Sess., Treasury Department Appropriation Bill for 1938, p. 69. Yet benefit payments are not expected to exceed $1,900,000. See H. Rep. No. 615, 74th Cong., 1st Sess., p. 6; S. Rep. No. 628, 74th Cong., 1st Sess., p. 9. It is only between 1965 and 1970, according to present calculations, that benefit payments will be even roughly equivalent to the taxes collected, and the benefit payments thereafter are expected to exceed the tax receipts. See H. Rep. No. 615, and S. Rep. No. 628, *ubi supra*.

Moreover, even if there be added to the benefit payments in any given year the current addition to the reserve, there would still be a wide discrepancy between that amount and the tax receipts under Title VIII. The benefit payments and addition to the reserve in any specified year are predicated upon many factors, some of which are entirely independent of contemporary tax receipts. The taxes would merely be a fixed percentage of wages paid during that year in the employments subject to the Act, while the appropriation would be dependent upon two major variables. The amount needed for current benefit payments would depend upon the number of eligible recipients then alive as well as

upon the amount and distribution of their past wages. The second major variable, the contribution to the reserve, is governed by Section 201, which requires that the reserve be maintained "in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt * * *." Thus there is room for variation here not only in possible revision of the mortality tables, but also in the fact that there are at least several very different methods of maintaining this reserve, all "in accordance with accepted actuarial principles."[23] The question is merely one of how the burden of anticipated expenditures should be distributed among succeeding annual Federal budgets in accordance with prudent business management. The "straight line" method and the method employing the present value of accrued liabilities are but two examples of widely divergent systems that could be resorted to. Yet the annual addition to the reserve under the first of these methods would be quite different from that called for under the second.[24]

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[23] See footnote 9, pp. 11–12, *supra*.

[24] Under a straight line method, involving an appropriation substantially equal every year in perpetuity ~~for each employee,~~ the annual appropriation would be ~~at the outset~~ in the neighborhood of $1,800,000,000. See footnote 9, pp. 11–12, *supra*. On the other hand, a very different result would be reached if there should be added to the reserve the then value of liabilities accrued during the year.

Thus, it is clear that not only are the Title VIII taxes covered unrestricted into the general treasury but also that there is no equivalence between the amount of those taxes and the expenditures authorized under Title II. It is not suggested, however, that Congress did not have Title II in mind when it imposed the taxes in Title VIII. Title II contemplated large future expenditures, and it is one of the characteristics of prudent government to provide new taxes roughly to offset the drain on the treasury to be occasioned by new expenditures. Title VIII does no more than that. It has an independent vigor, and is not conditioned in any way upon Title II for its operation.[25] The proceeds pass unrestricted into the general treasury and are not equated in any way to the authorized expendi-

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Since the monthly benefits under Title II are computed at the rate of ½ of 1 percent upon the first $3,000 of wages earned after December 31, 1936, at the rate of $\frac{1}{12}$ of 1 percent on the next $42,000, and $\frac{1}{24}$ of 1 percent on the rest, it is clear that there will be a considerably more rapid rate of accrual in the earlier years of operation of the statute. Thus, if this method were followed, it is expected that $5,000,000,000 or $6,000,000,000 a year would have to be added to the reserve during the course of the next few years, and that thereafter there would be a sharp decline in the amount called for.

[25] Contrast in this respect the processing taxes invalidated in *United States* v. *Butler*, 297 U. S. 1, 59, which were conditioned not only in operation, but also in amount by the spending program. Compare also *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 340–344, where the exactions, although not claimed to be taxes, were nevertheless paid into a special fund to meet the expenditures therefrom.

tures. The taxes were intended at most to relieve in a rough manner the anticipated drain upon the treasury. This budgetary correspondence exists nearly every time new taxes are imposed. See pp. 37–39, *supra*. Yet it has never been suggested that the rule of *Frothingham* v. *Mellon*, *supra*, should be relaxed merely because the taxes tend to balance the budget. To permit the rule to be so whittled away would go far to sanction a challenge to the Soldiers' Bonus by a taxpayer under the Revenue Act of 1936 because more taxes are demanded from him than under prior revenue laws. See p. 38, *supra*.

Accordingly, it is respectfully submitted that the fundamental rule of *Frothingham* v. *Mellon* should not be devitalized as was done in the court below, and that the propriety of the expenditures under Title II should not be considered by this Court.

III

The Expenditures Authorized by Title II Are Within the Authority of Congress Under Article I, Section 8, Clause 1

A. THE SCOPE AND CONTENT OF THE GENERAL WELFARE CLAUSE

By Article I, Section 8, clause 1 of the Constitution Congress is empowered—

> to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide

> for the common Defence and general Welfare of the United States; * * *.

This clause confers an express power to tax in order to provide for the general welfare. It also confers the implied, correlative power to spend the avails of the taxes for the same purpose. Of course, if Congress may tax for this purpose, it must have the power to appropriate the money which is raised to the same object. *United States* v. *Butler,* 297 U. S. 1, 65–67; *United States* v. *Realty Co.,* 163 U. S. 427, 440; *Legal Tender Cases,* 110 U. S. 421, 440.

This power of appropriation is not limited by or to the other enumerated powers. Rather, its limits are those implicit in the term "general welfare." It includes, in other words, any expenditure that will, by any "reasonable possibility", conduce to the *general* welfare of the United States. *United States* v. *Butler, supra;* Story, *Commentaries on the Constitution of the United States* (5th ed.), Vol. I, Chapter XIV; Hamilton, *Report on Manufactures,* in *Works* (Ham. ed.), Vol. III, pp. 192, 250. Though it is true that eminent men, upon whom respondent relies (Br. 57–58),[28] have at various times in our history asserted a contrary

[28] Veto messages of President Buchanan on bill to endow colleges in each State (February 24, 1859), Richardson, *Messages and Papers of the Presidents,* Vol. V, p. 547; of President Cleveland on an act to aid Texas drought sufferers (February 16, 1887), *id.*, Vol. VIII, p. 557. The veto of President Jackson in *id.*, Vol. II, pp. 483, 492, 589 is not, upon a fair reading, contrary to our view.

view, it must now be regarded as settled, not only by the *Butler* case, but also by the long continued practice of Congress in expenditures of public funds,[27] that Story and Hamilton were correct.

The determination whether a particular expenditure is for the general welfare is one of governmental policy—of political economy—in the largest sense of the term. In the very nature of this power, that question must be left to the determination of Congress. *United States* v. *Teller,* 107 U. S. 64, 68; *Frisbie* v. *United States,* 157 U. S. 160, 166; *United States* v. *Cook,* 257 U. S. 523, 527; President Monroe in Richardson, *Messages and Papers of the Presidents,* Vol. II, p. 166. If it were otherwise the Court would repeatedly be called upon to decide matters of policy and expediency—matters which it has often stated that it has no power to review. *Wilson* v. *New,* 243 U. S. 332; *German Ins. Co.* v. *Lewis,* 233 U. S. 389; *McCray* v. *United States,* 195 U. S. 27; *Champion* v. *Ames,* 188 U. S. 321; *Williams* v. *Heard,* 140 U. S. 529, 537; *Nebbia* v. *New York,* 291 U. S. 502, 537. In any event, this Court has stated that only when "by no reasonable possibility" can the challenged expenditure be said

[27] See brief for the United States in *United States* v. *Butler,* No. 401, October Term, 1935 (297 U. S. 1), at pp. 153–170; brief for the respondent Administrator in No. 32, *Duke Power Co.* v. *Greenwood County,* pp. 164–165; brief for respondent Collector in No. 837, *Steward Machine Co.* v. *Davis,* pp. 131–136. The legal effect of a long-continued practice is recognized in *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 328–329.

to fall within the "wide range of discretion" possessed by Congress will the statute be adjudged to be invalid. *United States* v. *Butler*, 297 U. S. 1, 65–67; *United States* v. *Realty Co.*, 163 U. S. 427, 444; *Head Money Cases*, 112 U. S. 580, 595.

In the present case there has been a long and intensive investigation of the problem to which this statute is a response. The President's Committee on Economic Security, over a period of six months, made a thorough preliminary investigation and report.[28] That Committee was aided not only by a Technical Board, composed of government officers, and by a research staff of government employees, but also by an Advisory Council, consisting of leading citizens in various fields, and seven advisory groups. Following this report, extensive hearings were held before the House Committee on Ways and Means and before the Senate Committee on Finance. The hearings, before the House Committee, extending from January 21 to February 12, 1935, resulted in 1,141 pages of testimony.[29] The Senate Committee hearing, extending from January 22 to February 20, 1935, produced 1,354 pages of testimony.[30]

In contrast to this, the record in the present case contains no evidence to overcome that presented to the Committees of Congress. Under these cir-

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[28] *Report to the President of the Committee on Economic Security* (1935).

[29] Hearings before the House Committee on Ways and Means on H. R. 4120, 74th Cong., 1st Session.

[30] Hearings before the Senate Committee on Finance on S. 1130, 74th Cong., 1st Session.

cumstances, we submit that the legislative determination by Congress that the expenditures authorized by the present Act were for the general welfare has not been overcome. In the analogous situation in cases arising under the due process clause of the Fourteenth Amendment, the presumption of constitutionality has been held to prevail in the absence of some factual foundation of record for overthrowing the statute. *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 258; *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580; *West Coast Hotel Co.* v. *Parrish*, No. 293, March 29, 1937. See also *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209 (equal protection clause); *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, 547 (full faith and credit clause).

In any event, however, we submit (1) that the Old Age Benefit payments contemplated by Title II will, at least by some reasonable possibility, conduce to the general welfare of the United States, and (2) that the form of the benefit payments for that purpose is wholly proper.

B. THE OLD AGE BENEFIT PAYMENTS CONTEMPLATED BY TITLE II WILL PROMOTE THE GENERAL WELFARE OF THE UNITED STATES

1. THE PROBLEM OF OLD-AGE DEPENDENCY *

There are today nearly 8,000,000 persons aged 65 or over in the United States, constituting ap-

* Analytical and research assistance has been furnished by Robert P. Bingham, Peter Seitz, Elliott H. Moyer, and Morton Stavisky.

proximately 6 percent of the total population.[31] In 1870 that age group contained 1,153,649 persons—3 percent of the population.[32] In other words, in less than 70 years, while the population has slightly more than tripled, the aged have increased over seven-fold, and their ratio to the total population is approximately twice as great.[33]

Even more significant is the prediction of population experts as to the increase in the number of aged persons in the future. Estimates vary, depending on estimates of future birth rates, mortality rates, and immigration, but a median estimate [34] indicates that by 1980, although the total population will have increased to only 158,000,000, those aged 65 or more will have increased to 22,-

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[31] Appendix, p. 64, Table 2. The Bureau of the Census estimates that on January 1, 1938, the number of persons aged 65 or over will be 7,988,000. Hearings before the Subcommittee of the House Committee on Appropriations on Independent Offices Appropriation Bill, 75th Cong., 1st Sess., p. 499.

[32] Appendix, p. 64, Table 2.

[33] This tendency of the population to include a relatively larger number of persons aged 65 or over is shown also for the middle aged. Since 1850 the age group 30–44 has increased from 16.6 percent of the population to 21.5 percent, and the age group 45–64 has increased from 9.9 percent to 17.5 percent. Appendix, p. 65, Table 3.

[34] Whelpton, P. K., *An Empirical Method of Calculating Future Population*, Jour. American Statistical Assn., Vol. 31, No. 195 (Sept. 1936), pp. 457, 473.

000,000—14 percent of the total population.[35] In other words, in 1980 there will be nearly *three times as many aged persons as there were in 1930.* Moreover, the increase will not be confined to those over 65; those in the age groups of 40–65 also show large absolute and relative increases[36]—a fact of great importance in view of the declining span of working life described below.[37]

The fact that the United States is at present faced with a much greater number of aged persons, proportionately as well as absolutely, than existed in 1870, and that it must expect an increasingly greater number until at least 1980, might well in itself justify action now and preparation for the future. But we need not rely exclusively on the factor of increasing numbers, as there are other considerations which have combined to increase the inability of aged persons to care for themselves—considerations which will continue to be present and which will far outweigh in importance even the rapid numerical increases.

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[35] The Committee on Economic Security estimated that in 1980 there would be 17,001,000 persons, or 11.3 percent of the population who would be 65 or over. Report of the Committee on Economic Security, p. 68. See also H. Rep. No. 615, 74th Cong., 1st Sess., p. 4. Louis I. Dublin, Statistician of the Metropolitan Life Insurance Company, estimates that persons 65 or over in 1980 will constitute 16.9 percent of all persons. Dublin, L. I., and Lotka, A. J., *Length of Life* (1936), p. 265.

[36] See Appendix, p. 65, Table 4.

[37] See pp. 56–58, *infra.*

The United States, during the past decade, has begun to experience the consequences of urbanization and industrialization.[38] During the early history of the country, families for the most part lived on farms or in small villages. Age meant continuation of occupation at a slower pace. Old men could still do chores around the farm; old women helped with various household activities. Cash was relatively unimportant, for people produced most of the goods which they consumed.

The urban industrial worker lives under entirely different conditions.[39] Cash with which to buy food, lodging, and other necessities is an essential requirement of urban life. However, the urban worker, reaching old age—and even middle age—all too frequently finds himself without cash reserves or property which may be converted into cash. This condition is explained by reference to two features of our industrial life: (a) the difficulty experienced by urban workers in laying aside a sufficient reserve out of their wages for old age

[38] In 1790, 3 percent of the population lived in cities of 8,000 or more inhabitants. In 1930 the number had increased to almost 50 percent. Thomas, Warren S., and Whelpton, P. K., *Population Trends in the United States* (1933), pp. 18–19. See also Goodrich, Carter, and others, *Migration and Economic Opportunity* (1936), p. 678; *Economic Insecurity in Old Age* (Social Security Board, 1937), pp. 21–22.

[39] For a discussion of the inability of the industrial worker to bridge the gaps in his employment see our brief in *Steward Machine Co.* v. *Davis*, No. 837 at pp. 13–20. See also, generally, *Economic Insecurity in Old Age*, *supra*.

while maintaining themselves and their families at a level compatible with American minimum standards of health and decency and (b) the periodic wiping out of their accumulated savings by various emergencies occurring during their working years, and the ravages of economic depressions.[40]

[40] Some appreciation of the extremity of the worker's position may be gained from the following brief digest of the contributing factors. The average per capita full-time income of employees in mining, quarrying, manufacturing, construction and transportation in the prosperous year 1929 was but $1,404 and in the depression year 1933, $929. Martin, Robert F., *National Income and Its Elements*, National Industrial Conference Board, Inc. (1936), page 29. 53 percent of non-farm families in 1929 had incomes of less than $2,000, and 75 percent had incomes of less than $3,000. Brookings Institution, *America's Capacity to Consume* (1934), p. 261. In 1929 it was estimated that an income of $2,000 was essential to maintain a family of five in Chicago to meet a minimum budget compatible with American standards of decency and health. The *Chicago Standard Budget for Dependent Families*, Chicago Council of Social Agencies (1929), p. 49.

Adjusted to the cost of living index of the Bureau of Labor Statistics, this amount in 1935 was $1,602. The cost of living studies conducted in numerous urban centers by the Bureau of Labor Statistics indicates that one-third to one-half of low-income families not only fail to save in a given year but suffer a decrease in assets or an increase in liabilities. The average New York and Detroit family in the period 1934–1936 was forced into debt annually to the extent of $96 and $13, respectively. In Boston, the average family was able to save only $2 a year. *Economic Insecurity in Old Age*, pp. 56, 86.

Thus it is evident that the urban wage earner, who is usually the sole or principal source of family income, after making necessary expenditures for the family budget, will,

Low as is the average wage paid to *all* persons in industry, the average wage paid to industrial

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in all probability, have insufficient reserves to meet even immediate and impending emergencies.

The major hazard facing the wage earner is the loss of income resulting from unemployment. The average annual loss during the last 40 years in all non-agricultural industry has been about 8 percent. Douglas, Paul H., and Director, Aaron, *The Problem of Unemployment* (1931), p. 32. This means in absolute figures an average annual loss in wages due to unemployment of approximately 4.2 billion dollars and average annual unemployment of about 2,780,000 persons. *Economic Insecurity in Old Age*, p. 95. In the period from 1929 to 1936, according to conservative and authoritative estimates, the number of unemployed reached as high an average as 10,000,000, and at one point of time during this period the total number of unemployed approximated 16,000,000 persons. See brief in *Steward Machine Co.* v. *Davis*, No. 837, p. 11, and references therein set forth. In addition, in both normal and depression times, part time or under employment and absenteeism due to disability, family misfortune, temporary layoffs, bad weather, etc., cut deeply into and substantially reduced the income of workers. It has been estimated that these alone count for an 8 percent loss in wages. Douglas, Paul H., *Real Wages in the United States 1890–1926* (1930), p. 478. See also *Economic Insecurity in Old Age*, p. 99.

Even when industrial workers are enabled to accumulate savings out of their incomes for their old age, they are frequently drained away by expenditures for recurring emergencies which they must meet in the course of their industrial lives, such as the following:

(a) Sickness and Accidents: The average annual cost of medical care per family in families with annual incomes from $1,200 to $2,500 is $86. In families with incomes of less than $1,200 the cost is $49 per family. Falk, I. S., *Security Against Sickness*, p. 15. The aggregate annual loss of earnings and cost of medical care due to illness has been found to be 2.4 billion dollars in families with incomes of less than $2,500. *Ibid.*, p. 13.

workers after early middle age is even lower. Inability of the middle aged to adjust themselves to

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(b) Death: The average cost of funeral and burial in 1927 was $363. Gebhart, John C., *Funeral Costs, Miscellaneous Contributions on the Costs of Medical Care*, No. 3 (1930), p. 5; *Economic Insecurity in Old Age*, p. 107. To meet this cost low income families carry industrial or "burial" insurance. It has been estimated that 5 to 6 percent or more of family income in the lower income brackets is spent for premiums for such insurance in normal times; from 10 to 12 percent is spent for such insurance by such families during periods of depression. Taylor, Maurice, *Social Cost of Industrial Insurance*, p. 251; *Economic Insecurity of Old Age*, pp. 65, 66. Despite this large expenditure the average amount of such insurance carried is only $309. Thus average funeral expenses actually exceed the amount of insurance available by 17.7 percent. Gebhart, John C., *Funeral Costs 1930*, pp. 4, 5; Also see Gebhart, John C., *The Reasons for Present Day Funeral Costs*, 1928, and *Economic Insecurity in Old Age*, p. 107.

(c) Savings Account Withdrawals and Bank Failures: The principal type of savings of workers in low income groups consists of deposits in savings accounts. During the last depression, in the four years ending June 30, 1934, 13,000,000 depositors closed their savings accounts and over 17 billion dollars were withdrawn during that period. In addition to these voluntary withdrawals, between 1931 and 1935, 13,648 national, state, and non-member banks with $7,816,830,000 deposits were suspended. How many wage earners lost their life-time savings in such banks is not known, but it is reasonable to suppose that they bore their share of such losses. *Economic Insecurity in Old Age*, pp. 141, 142.

(d) Insurance losses: Industrial or "burial insurance" which has a very low cash surrender value is the only type of insurance generally available for low-income urban workers. However, during depression years, due to unemployment, workers cannot continue their weekly or monthly payments on such insurance. In the four years from 1932–5, inclusive, nearly 20 million industrial policies were

changing labor demands or new jobs, competition of younger workers in an overabundant labor market, and arbitrary dismissal policies of many employers [41] are increasing the premature superannuation and permanent unemployment in middle life.[42] Particularly in times when retrenchment is necessary, the older employee will suffer a loss of wages in all except the most highly skilled occu-

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surrendered. The face value of such policies was over 4 billions of dollars in the aggregate, and even greater loss was sustained in the lapsing of 58 million policies with a face value of 13 billions of dollars. It is estimated that policyholders lost on the average of 40 million dollars a year for each of the five years from 1928 through 1932 on lapsed policies. *Economic Insecurity in Old Age*, pp. 119–122.

(e) Loss of homes and investments: Those workers who were able to save sufficiently to own their own homes suffered severe losses in the depression. About one million families lost their homes through foreclosures from 1930–1936, inclusive. It is estimated that over 2 billion dollars were lost in home equities during that period. *Economic Insecurity in Old Age*, p. 128. In addition, workers who were successful in saving suffered losses in the deflation of the values of securities and other types of investment. *Economic Insecurity in Old Age*, pp. 132–138.

[41] *Middle-Aged and Older Workers* (Calif. Dept. of Industrial Relations), Special Bulletin No. 1, p. 35, No. 2, pp. 34, 98; Barkin, Solomon, *The Older Worker in Industry*, (N. Y. Legis. Doc. No. 66, 1933), p. 159.

[42] See, *e. g.*, *The Older Worker in Maryland* (Commissioner of Labor and Statistics, 1930), p. 39, which shows that the ages of highest frequency in manufacturing establishments in Baltimore, and in other parts of the State, were 18 and 22, respectively, and that the median ages were 29 and 30, respectively. See also Appendix, pp. 77–78, Table 13.

pations."[43] Moreover, contrary to the rule in professional and skilled occupations, the peak of an average industrial worker's earning power is reached in early middle life, and even those old employees who succeed in retaining their positions will find their wages rapidly becoming less."[44]

The hazards of the *employed* older worker, however, are negligible compared to those encountered by the unemployed man or woman over 40 who seeks reemployment. The inability of older men to meet production standards, the higher group insurance rates when older employees are hired, and the burden of taking care of employees already grown old with the company have combined to cause most industries to adopt employment policies that militate strongly against the middle-aged unemployed.[45] Sample studies reveal that such policies are not a consequence of the depression, for in 1929, in New York, 28 percent of the manufacturing plants had a hiring age limit, commonly 45.[46]

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[43] Barkin, Solomon, *supra*, p. 159.

[44] Appendix, p. 66, Table 5,

[45] *Hiring and Separation Methods in American Factories*, Monthly Labor Review, Vol. 35, No. 5, pp. 1005–1017, November 1932, p. 1009. Boyd, Charles J., *Some of the Problems of the Middle-Aged Man—His Chances of Securing Employment* (U. S. Dept. of Labor, Bureau of Labor Statistics), Bulletin No. 478, 1928, pp. 19–21; *Hearings Before the House Committee on Ways and Means*, *supra*, pp. 199, 220, 1005; *Hearings Before the Senate Committee on Finance*, *supra*, pp. 177–178, 760–761.

[46] *The Older Worker in Industry* (Annual Meeting of Nat. Ass'n. of Manufacturers, 1929), p. 12.

In 1930, out of 224 American factories, 71, or almost one-third, had fixed maximum hiring age limits; in 4 plants the limit was under 40, in 45 it was under 46. In the other 153 plants there were no fixed limits, but in practice few were hired who were over 50 years of age."[47] Seasonal, and *a fortiori* cyclical, depressions accentuate the problem. During the recent depression, for example, when over one-third of all gainfully employable workers were unemployed,[48] workers over 40 were laid off to an even greater extent than young workers. And those over 40 will in most cases never again be able to find employment."[49]

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[47] *Hiring and Separation Methods in American Industry*, Monthly Labor Review, Vol. 35, No. 5, pp. 1005–1017, Nov. 1932, p. 1009.

[48] In 1930 there were 48.9 million gainfully employable persons in the United States. *Fifteenth Census, 1930*, Vol. V, p. 114. Estimates of the maximum number of persons unemployed during the depression range from 14 to 17 millions. See Appendix to brief for the respondent Collector in No. 837, *Steward Machine Co.* v. *Davis*, pp. 77–79, Table 20.

[49] "Industry is not keen about hiring older applicants. In fact, it can be said, on the basis of the experience of some 2,300 manufacturing establishments in the latter half of 1930, that the older persons will hardly succeed in obtaining employment. The age when hiring handicap begins for males is 35 years and females 30 years. The chances of an unemployed person of 40 years and over obtaining employment are only about 19 percent as good as those of a person under 20 years of age. In comparison with the average person, the older male suffers a 59 percent handicap and the older female a 65 percent hiring handicap. These barriers grow more formidable with advancing age so that in

One would be justified in concluding, without more, that a large proportion of all workers, upon reaching the age of 65, would be dependent upon others for support. Such studies as have been directed to this question completely bear out the conclusion.[50]

Three extensive state surveys, all of which antedate the depression, may be cited. In Pennsylvania, in 1919, a study of 16,281 persons and interviews with more than 3,500 persons 65 years of age and over showed two-fifths with no income but wages and one-fourth supported by children; 1.5 percent had savings and 11.8 percent had property.[51] In Massachusetts, in 1924, two-thirds of those above 65 had, alone or with a spouse, less than $5,000 of property, and one-fourth had none. Two-thirds of those with less than $5,000 were dependent in whole or in part on others for support.

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the case of males, the handicap for those 50–54 years is 66 percent and for those 60–64, 83 percent, in comparison with the average person's ability to obtain employment. In the above survey, it was found that only 15 percent of the newly hired were 40 years or over, and only 8.5 percent 45 years and over." Barkin, Solomon, *The Middle-Aged Worker—His Chances in Industry*, in *Social Security in the United States* (1933), p. 20–28.

[50] The Senate Committee estimated that over half of the people in the United States over 65 years of age are dependent upon others for support. Sen. Rep. No. 628, *supra*, p. 4. A similar estimate was made by the Committee on Economic Security. H. Doc. No. 81, 74th Cong., 1st Sess., p. 20.

[51] *Report of Pennsylvania Commission on Old-Age Pensions* (1919), p. 108.

Nothing was ascertained of the income of those with property of $5,000 or more.[52] In New York, in 1930, total dependency, including aid from organized charity, restraint in institutions and support by friends and relatives amounted to 58 percent for those 65 and over and 62 percent for those 70 and over.[53] As we have said, these are all pre-depression studies; many of those with property in Pennsylvania and Massachusetts no longer have it; many who relied upon wages now rely upon others for their support.

The experience of the national government in making expenditures under Title I of the Social Security Act furnishes more recent information. For instance, in February 1937, 38.8 percent of all persons over 65 in Colorado received public assistance. In Oklahoma the percentage was 44.1, and in Texas 37.5. In 10 States out of 41 with plans approved by the Social Security Board more than 25 percent of those over 65 could meet the residence requirements and qualify under a means test and were actually receiving public aid.[54]

A recent study made by the Social Security Board (set out in detail in tabular form in the Ap-

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[52] *Report on Old-Age Pensions* (Mass. Comm. on Pensions) Senate No. 5 (1925), pp. 41, 52.

[53] *Old Age Security* (N. Y. State Comm.), Legis. Doc. No. 67, 1930, p. 39. See Appendix, pp. 66–67, Table 6.

[54] *Economic Insecurity in Old Age*, *supra*, p. 15.

pendix, pp. 75–77, Table 12), summarizes the available material as follows:

> Bringing together the dependency rates indicated by State surveys, census data, and recent estimates on unemployment among the aged and the latest available data on old-age assistance under the Social Security Act, we find the extent of dependency among persons 65 and over at the end of 1936 to be as follows: One-fifth of the aged in the United States were receiving old-age assistance, emergency relief, institutional care, employment under the Works Program, or some other form of aid from public or private funds, one-half to two-fifths were dependent on friends and relatives, one-eighth had some income from earnings, and possibly one-sixth had some savings or property. *Almost three out of four persons 65 or over were dependent wholly or partially on others for support.*[54a] [Italics supplied.]

The above quotation shows what an alarming proportion of those over 65 are dependent. And those who are dependent are increasingly unable to find support from private resources. Moreover, although reliance upon relatives for support of the aged is still widespread,[55] this reliance itself has

[54a] *Id.* p. 15.

[55] In New York, in 1929, of all persons over 65, 49.4 percent were wholly dependent upon relatives and friends. *Old Age Security*, Legis. Doc. No. 67, *supra*, p. 39. In Massachusetts, in 1925, 35.4 percent of dependent aged not cared for by charity were in this class. *Report on Old Age Pensions*, Sen-

disastrous consequences. The relatives on whom the aged depend themselves receive such low incomes [56] that in meeting the cash needs of the aged they often sacrifice the immediate welfare of the younger members of their families by forcing them to begin work before acquiring an education, and, by using up the resources of both old and young, intensify the problem for the next two generations.[57] The seriousness of the drain of older persons upon their younger relatives is apparent when we recognize that only in rare cases do children rise above the financial level which their parents have attained.[58] It is because of this fact that public welfare laws which require legally responsible relatives to support needy parents and grandparents are so generally ineffective in their operation, even when the aged have children to whom to turn.[59] For the large group of unmarried

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ate No. 5, *supra*, pp. 48, 49, 56. In Michigan cities, in 1935, one-third of all unemployed men over 65 were dependent upon relatives. Haber, W., and Stanchfield, P. L., *Unemployment, Relief and Economic Security* (1936), p. 189.

[56] See Brief for respondent Collector in *Steward Machine Co.* v. *Davis*, No. 837, p. 17; *Economic Insecurity in Old Age*, *supra*, pp. 37–52.

[57] *Hearings before the House Committee on Ways and Means*, *supra*, p. 220; Nassau, M. L., *Old Age Poverty in Greenwich Village* (1915), pp. 70, 72.

[58] *Report of the Pennsylvania Commission on Old Age Assistance* (1925), p. 41.

[59] Several studies show the inability of the family to care for its aged. In Wisconsin, in 1933, 30 percent of the persons receiving public old age assistance were dependent upon relatives at time of application. *Old Age Assistance in*

or childless the only resort is to charity or public support.[60]

Although many industrial establishments and worker groups have long been aware of the need for assistance to the aged worker and have, therefore, set up privately operated pension systems, group insurance, and trade union pension systems, these systems have, at most, a limited coverage and are frequently open to several fundamental objections.

Industrial pension systems, beginning in this country in 1875, have developed largely since 1900,[61] but even by 1930 only 4,000,000 employees in the United States and Canada (including employees in the railroad industry and other activities not covered by Title II of the Social Security Act) were covered by some 400 plans, and in 1931

Wisconsin (State Board of Control, 1933), p. 23. In Pennsylvania, in 1924, the corresponding figure was 52.7 percent. *Report of the Pennsylvania Commission on Old Age Assistance* (1925), p. 43.

[60] Three-fourths of persons dependent on organized charity in their homes in Massachusetts, in 1924, had no living children. *Report on Old Age Pensions* (Mass. Comm. on Pensions, 1925), p. 115. The same was true of two-thirds of old people receiving charitable care in California. *Old Age Dependency* (Calif. Dept. of Social Welfare, 1928), p. 35. Over 91 percent of residents in fraternal and benevolent homes were single or widowed in Massachusetts in 1924. *Report on Old Age Pensions*, *supra*, p. 114.

[61] Wyatt, B. E., *Private Group Retirement Plans* (1936), p. 21; *Old Age and Disability Pensions*, Sen. Doc. No. 140, 70th Cong., 1st Sess., p. 99.

approximately 90,000 persons—one percent of the aged population—received pensions from these private systems. These pensions averaged, at most, $14 a week.[62] As industry begins to experience the increasing burden of the aged, many of these plans break down or are sharply curtailed, due to rapidly mounting costs and failure to set up proper reserves.[63] Moreover, these plans often reduce labor's freedom of movement, since benefits are usually dependent upon maintaining a connection with a particular company until old age is reached. The necessity of remaining with a particular employer in order to receive a pension often causes workers to submit to poor working conditions. And even this submission may not achieve its purpose, since these private pensions are usually pure gratuities which may be revoked at any time, or may be lost if the employer becomes insolvent.[64]

Group retirement plans, though much more satisfactory, are even more limited in coverage. From

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[62] Latimer, Murray Webb, *Industrial Pension Systems in the United States and Canada* (1932), pp. 869, 995–996. Data for the United States and Canada are not separately reported. The Bureau of Labor Statistics in 1928 found the prevailing monthly grant to be much smaller—$20 to $25 per month. Conyngton, M., *Industrial Pensions for Old Age and Disability*, Sen. Doc. No. 140, 70th Cong., 1st Sess., p. 124.

[63] Edwards, G., *Retirement Plans in Industry: Industrial Pension Plans Collapsing*, The Annalist (Nov. 20, 1925), p. 4; Latimer, M. W., *supra*, p. 939.

[64] *Economic Insecurity in Old Age*, *supra*, pp. 159–161.

less than 20 group annuity contracts in force in 1924, the number has expanded to 441 in March, 1936, but on the latter date only 350,000 employees were covered,[65] and in 1935 *only 6,559 persons in the United States and Canada received pension payments.*[66]

Another type of old age pensions is that provided by the workers themselves in the form of trade union pensions. In 1932 there were 25 unions, with a total membership of 1,500,000, with one or more forms of superannuation or permanent and total disability relief plans.[67] Benefits, however, have been small; the *total* payments to 1928 for this purpose in all unions was $21,500,000,[68] in 1928 the total beneficiaries numbered only about 11,000,[68a] and in 1934 only $3,912,940 was devoted to this purpose.[69] Failure to establish such plans on a sound actuarial basis, coupled with the fundamental difficulty of the high cost of any pension systems for old age, has resulted in either greatly decreased benefits or abolition of the plans.[70]

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[65] Wyatt, B. E., *Private Group Retirement Plans* (1936), pp. 24–25.

[66] *Industrial Pension Systems in the United States and Canada* (Industrial Relations Counselors, Inc., 1936), p. 19.

[67] Latimer, M. W., *Trade Union Pension Systems* (1932), p. 116.

[68] Appendix, p. 68, Table 7.

[68a] *Economic Insecurity in Old Age*, *supra*, p. 165.

[69] Appendix, p. 68, Table 8.

[70] "On the whole the conclusion seems inescapable that the trade union pension systems cannot much longer be main-

The funds made available through private charity, unfortunately, are wholly inadequate to cope with a problem of such great magnitude. Our brief in *Steward Machine Co.* v. *Davis,* No. 837, pp. 20–21, and the very revealing reports of the Treasury as to the amount contributed by private persons to private charities,[71] demonstrate that pri-

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tained on their existing financial foundations and that attempts to strengthen these bases will result in such losses of membership as to make this alternative course impossible * * *.

"The fundamental difficulty has been the unavoidable high cost of any pension system. Trade unions were handicapped from the start. The level of wages in the early nineteen hundreds in most trades was undoubtedly too low to permit the accumulation by wage earners, individually or collectively, of funds sufficient to pay adequate old-age benefits on sound actuarial principles. * * * The number of dependent and disabled members has grown faster than have the earnings of the members. It has simply not been possible for the active membership of the unions to support their dependent fellows and at the same time build up funds for their own future maintenance when sustaining employment is no longer available. Benefits of the type analyzed in this study are not the only ones which unions maintain; there are others for more immediate purposes so far as active members are concerned, such as for death, temporary disability, unemployment, and defense (strikes). It is entirely natural that the limited resources of wage earners should be devoted to immediate needs rather than to those of a distant and uncertain future." Latimer, M. W., *supra*, p. 125, 1924–1925.

[71] In July 1935 approximately 1,000 welfare agencies in 118 of the larger urban areas of the United States reported that relief from private funds amounted to only 1% of the total relief expenditures of all kinds in those areas in that month. A year later, with the diminution of Federal ex-

vate charity does not receive large enough subscriptions to care for even the unemployed, much less for the aged, whose need is chronic, and for whom there is little or no chance of rehabilitation. Indeed, in large part no attempt is made to do so.[72] As the magnitude of the problem becomes increasingly apparent, particularly since the recent depression, calls upon public agencies have rapidly increased. Almshouses[73] and hospitals for mental

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penditures for public relief, the same source accounted for only 2.7% of all relief expenditures. See brief in *Steward Machine Co.* v. *Davis*, No. 837, at pp. 21–22.

The inability of private charities to rise to demands of economic depression is strikingly illustrated by the following figures from the records of the Bureau of Internal Revenue: In 1928 the 248 persons whose incomes ranged from $1,000,000 to $1,500,000 contributed an average of but $30,000. In the same year the 3,000 persons whose annual incomes ranged from $300,000 upwards limited their total contributions to an average of $25,400 each. In 1930, however, when the demand for relief was more urgent and pressing the individuals in the groups receiving more than $300,000 reduced their average contributions from $25,400 to $19,600. In 1931 they contributed only $12,900. Instead of meeting the need for relief by proportionately larger contributions out of their incomes the wealthiest class retrenched to the extent of 50 percent as against 22 percent for all income tax payers. See Epstein, *Insecurity: a Challenge to America* (1936), p. 165.

[72] *Report on Old Age Relief* (Ind. Comm. of Wis., 1915), p. 11; *Old Age Dependency* (Calif. Dept. of Social Welfare, 1929), p. 29.

[73] At present there are probably between 40,000 and 50,000 people over 65 living in almshouses, a slight increase over 1923. *Number of Aged in Public and Private Institutions*, 1930, Monthly Labor Review, Feb. 1932, pp. 253–261; *Paupers in Almshouses* (U. S. Bureau of Census, 1923), p. 10.

diseases,[74] obviously very limited in capacity, care for only a relatively small part of the indigent aged. Chief reliance, of necessity, has come to be placed upon public relief.

State old age assistance benefits, beginning in Montana in 1923, have increased rapidly since 1930. By February 1937, 40 States, the District of Columbia and the Territories of Alaska and Hawaii had passed old age assistance laws.[75] An average of 17.2 percent of all persons over 65 was so benefited, at a cost for that month of $22,440,366.[76] During the year 1936, 1,111,054 aged persons received assistance under state laws at a cost of $161,919,996, an average payment of $18.76 per month.[77] Of this total, $80,710,674 was contributed by the Federal Government under the provisions of Title I.[78]

State laws, however, are subject to several inherent defects. Administratively, the migration of population during the course of a working life-

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[74] The number of persons over 65 in such hospitals probably slightly exceeds those in almshouses, and are becoming an increasingly large proportion of the total patients. *Statistical Abstract of the United States* (1934), pp. 73–74. In New York, in 1932, only 12.1 percent were paying patients. *44th Annual Report* (New York State Dept. of Mental Hygiene, 1935), p. 166.

[75] Appendix, pp. 69–70, Table 9.

[76] *Ibid.*

[77] Appendix, pp. 71–73, Table 10.

[78] *First Annual Report, Social Security Board*, Appendix IV, Table 15, p. 89.

time [79] has been thought to create insuperable difficulties unless very high residence requirements are imposed.[80] Financial burdens are heavily weighted against the poorer States. Population changes added to many western States workers who soon will require—indeed already require—old age dependency assistance.[81] States having a large num-

[79] In 1930 one white person out of three was not residing in his State of birth, and in many western States the white population was only half indigenous. *Fifteenth Census, 1930.* Population, Vol. II, p. 147; Golpin, C. T., and Manny, T. B., *Interstate Migrations Among the Native White Population* (U. S. Dept. of Agric., 1934), p. 7. Since the Civil War there have been three major and innumerable minor trends of migration in the United States. Goodrich, C., and others, *Migration and Economic Opportunity* (Report of the Study of Population Redistribution, 1936), p. 678. See Thornthwaite, C. W., *Internal Migration in the United States*, loc. cit., and Bulletin No. 1 of the same study; *Economic Insecurity in Old Age, supra*, pp. 197–200.

[80] Douglas, Paul A., *Social Security in the United States* (1936), pp. 35–36; S. Rep. No. 628, *supra*, p. 5; *First Annual Report, Social Security Board* (1936), p. 8.

[81] In Oregon, in 1934, 82 percent of those who applied for old age pensions were born outside the State. Kehrli, H., *The Operation of the Oregon Old-Age Pension Act*, Commonwealth Review, Vol. XVI, No. 5 (Jan. 1935), pp. 205–221; Oregon University, Bureau of Municipal Research, p. 215. In California, in 1924, 6 percent of the dependent aged were born in the State, and 33 percent had lived there less than 20 years. *Old Age Dependency* (Calif. Dept. of Social Welfare, 1928), p. 34. In Wisconsin, in 1931, 66 percent of the aged receiving public assistance were born in other States or were foreign born. *Old Age Assistance in Wisconsin, 1931* (State Board of Control, 1931), p. 8; *Economic Insecurity in Old Age, supra*, p. 200.

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ber of residents who work in other States would bear a part of the burden of old age dependency disproportionate to the taxable payroll within the State.[81a] Moreover, although all parts of the United States contribute to the production of wealth, sources at which that wealth may be tapped by taxation are highly colonized in a few favored States (cf. *Dane* v. *Jackson*, 256 U. S. 589, 599–600), with the result that many States are unable adequately to support educational institutions[82] and public welfare services,[83] much less to care not only for the tremendous burden of emergency relief imposed during the depression,[84] but also for the constantly augmenting group of aged persons.

The disparate financial resources of the States, together with the natural reluctance of any one State to act alone in imposing additional tax burdens on industry,[85] have resulted in establishing scales of benefits that vary widely, and are fre-

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[81a] The situation would be particularly acute in Connecticut (many of whose citizens work in New York City), in New Jersey (many of whose citizens work in New York City and Philadelphia), and in Indiana (many of whose citizens work in Chicago). Numerous other instances of the same kind could be cited.

[82] Norton, K., *American Educational Finance* in Studenski, *Taxation and Public Policy*, ch. VI, pp. 95–107; *Economic Insecurity in Old Age*, *supra*, p. 184–185.

[83] *Hearings on Economic Security Act* (S. 1130), Senate Committee on Finance, 74th Cong., 1st Sess., pp. 376, 378, 382.

[84] Appendix, pp. 74–75, Table 11.

[85] See brief in *Steward Machine Co.* v. *Davis*, No. 837, pp. 25–26.

quently absurdly low. The average payment for February 1937 was $18.76,[86] and in four of the States was no more than $4.02, $9.04, $10.05, and $10.46, respectively. Even these low payments, it is to be noted, were possible only because half of the benefits and a large part of the administrative costs were paid by grants of the national government made under Title I. These grants-in-aid, amounting to $11,030,459, were paid to 40 of the States.[87]

That part of the cost of the State programs *which the States alone will bear,* would, in the absence of Title II, by 1950 rise to approximately $700,000,000, even if the Federal Government continues to make subventions to States under Title I.[88] In view of the fact that the maximum amount spent by States and localities in any one year for relief of all age groups was less than half a billion,[89] it is wholly unlikely that they will be able, in the next few years, to raise the even larger sums required for permanent public support of the aged.

It might be asked why the old age dependency problem was not dealt with in some such fashion as was adopted in Title IX with respect to the problem of unemployment compensation. Two princi-

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[86] Appendix, p. 69, Table 9.

[87] Public Assistance Monthly Statistics for the United States (Social Security Board, February 1937), Vol. II, No. 2, p. 2.

[88] *Hearings before Senate Committee on Finance*, 74th Cong., 1st sess., on S. 1130, p. 84, Table III; *Economic Insecurity in Old Age*, *supra*, p. 205.

[89] Appendix, pp. 74–75, Table 11.

pal obstacles stood in the way of a tax-credit method of encouraging States to set up old-age plans similar to their unemployment compensation systems.

In the first place, the population structure varies quite widely as between different States. Some States have a higher percentage of aged than do other States. Interstate migration, moreover, makes prophecy of future population trends—which are difficult enough for the nation as a whole—virtually impossible in dealing with particular States.

A uniform rate of tax collection by the separate States, therefore, would either produce very different rates of benefit payable by them, or would bankrupt some state plans while yielding large surpluses in others. And as a matter of long-range planning, no one State could do much more than guess what benefit rates it could afford. A State with high benefit rates, moreover, would tend to attract those approaching old age, and that fact in itself would greatly complicate actuarial computations and jeopardize solvency.

In the second place, if benefits were to be based on past earnings, the migration of labor from State to State would make the keeping of records virtually impossible by separate States—not to mention the transfers of funds from State to State that would be necessary if the system were to operate equitably. See Brown, *Development of the Old Age Insurance Provisions*, Law and Contemporary Problems, Vol. III, pp. 186, 191–192.

The economic situation with respect to old age benefits is far different from that with respect to unemployment compensation. Individual unemployment, at least so far as it has been deemed possible to provide for compensation against it, is characteristically of short duration. It emerges in many forms; it does not affect more than a minority of the gainfully employed at any time, and many never experience it at any time. It is a product of human relationships which may be changed and controlled. Old age and retirement are, apart from death, inevitable. Once its incidence is felt it is, with rare exceptions, permanent, and its duration is appreciable. It emerges in the same form; it terminates in the same ways. While medical science and industrial practices and needs may move the age of onset and affect duration, its fundamental characteristics are not altered.

A standardized cost for unemployment benefits means variations in benefit rates and vice versa. But these are temporary, not permanent variations; and such migration as there is tends to reduce dispersion. The volume of migration, however, is but little affected; men give little weight in their calculations to a brief benefit which, they hope, they will never have to receive.

Provisions of benefits for the unemployed takes into account relatively short periods, but provision of benefits for the aged takes into account a life time. Administrative differences arising from

this fact are considerable. Migration may affect record and disbursement problems for unemployment compensation to but a slight degree, but each case of migration affects old age benefit needs and disbursements.

2. THE BENEFITS UNDER TITLE II ARE FOR THE GENERAL WELFARE OF THE UNITED STATES

In the light of the above facts, which were fully developed in extensive hearings before both the Senate and the House of Representatives,[90] we submit that whatever criteria be adopted, the old age benefits under Title II are for the general welfare. Certainly, these payments meet the tests suggested by Story:[91] the object—relief of the aged unemployed—is general, not local, in character, and the operation of the appropriation extends in fact throughout the nation. If national character of the problem be a criterion, it would be difficult to imagine a case in which clearer proof exists. If it be the quality of the results which flow to the general body politic, again the proof is overwhelming. Today no one, no matter how wealthy, can be sure that he will have funds in his old age. Even what he saves may be wiped out in a depression, and he cannot even know for how long an old age he must provide. Thus any man may justifiably fear for his financial poistion in his last years. The payments contemplated under

[90] See p. 48. *supra.*

[91] Story, *Commentaries on the Constitution of the United States* (5th ed.), Vol. I, Sec. 978.

Title II, and the policy therein embodied, will, for multitudes of people, eliminate the insistent dread of eventual poverty. Even those who are fortunate enough to possess small savings and who are willing to live upon the capital they have accumulated during productive years will no longer live in dread that it will be exhausted before they die. Moreover, the circle by which old age dependency promotes old age dependency will, in some measure, be broken. Family funds formerly required to support aged parents and grandparents may, instead, be used for pressing needs of the family which heretofore have so often wiped out its savings and forced it into debt. Benefit payments will constitute a valuable addition to purchasing power in periods of depression. It is for reasons such as these that 20 foreign countries have established old age insurance and pension systems.[92]

We do not contend that the inability of the States to perform a function creates a new national power to do so. However, where the national government already has a power, as it has the power to spend for the general welfare of the United States, the inability of the States to act may furnish the occasion for the exercise of the power. Thus when the question is whether an expenditure is for the general welfare, the fact that the States acting alone are, for many reasons, handicapped, is highly significant.

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[92] *Report of Committee on Economic Security*, *supra*, pp. 69–70.

Future aid by the States will, of course, be an essential supplement to Title II. Those who are not included within the benefits, those whose earnings were so low or whose working life was so short that the benefits under Title II are insufficient, those who need particular care due to sickness, accident, or other unpredictable hazard, must be cared for under the State old age assistance laws, financed in part through grants under Title I. Similarly, as business men have already realized,[93] existing and new industrial pension plans will provide valuable complements to the grants under Title II.

We submit, therefore, that an appropriation for the purpose of paying benefits to aged persons under Title II is for the general welfare of the United States.

3. THE PROVISIONS OF TITLE II ARE SOUNDLY DESIGNED TO PROMOTE THE GENERAL WELFARE

Even assuming that respondent has a standing to question whether the broad purpose for which expenditures are to be made under Title II is one which falls within the general welfare clause, we submit that he has no standing to question either the form or the propriety of any particular benefit or exclusion from benefit. Since the broad pur-

[93] It is interesting to note that few, if any, private pension plans have been abandoned because of the passage of the Social Security Act. Indeed, the passage of the Act, far from discouraging private pension plans, has stimulated new private plans. See Witte, *supra*, p. 33.

pose of Title II is for the general welfare, clearly the invalidity of any particular benefit or exclusion would not cause the whole statute to fall. Cf. *Field* v. *Clark,* 143 U. S. 649, 695. Respondent is, in other words, unaffected in any degree by the specific provisions. Moreover, the benefits under Title II are, like pensions, to be given or withheld in the discretion of Congress. *Walton* v. *Cotton,* 19 How. 355; *United States* v. *Teller,* 107 U. S. 64, 68; *Frisbie* v. *United States,* 157 U. S. 160.

a. The simple means test provided by the statute

By Section 202 (a) of the Act every qualified individual—defined in Section 210 (c) as one who has reached the age of 65, and who, before reaching 65, and after December 31, 1936, has earned total wages of $2,000 with respect to covered employment on at least one day in each of five different calendar years—shall be entitled to a monthly benefit payment, not to exceed $85, based on his past earnings. By Section 202 (c) no benefit payment is to be made to an otherwise qualified person so long as he is regularly employed.

The Act thus provides a practical means test which is well adapted to the problem of old age dependency of the industrial worker: no monthly benefits are payable unless the recipient is over 65 and not employed.[94] We have shown that the great proportion of industrial wage-earners who reach

[94] Sen. Rep. No. 628, *supra*, pp. 3, 10.

65 are either dependent upon their current earnings from employment or upon public, private, or family aid. Those workers who are 65 years of age or over, and are unemployed, may reasonably be deemed to be in need of the monthly benefits. The number of industrial workers who reach that age and are not in employment but have sufficient savings to carry them through the remainder of their life span is relatively small.

Any further qualifications by which to test the need of an aged person for benefit payments are open to several serious objections.[95] A strict means test puts a premium on indigency and discourages thrift, for those who had, by personal sacrifice, saved a sufficient amount to eke out a living in their old age would be barred, while those who have not saved would be supported by the public.[96] Many, if not most, of the needy aged have arrived at that state through no fault of their own; to compel them, as a requisite of old age benefits, to undergo the humiliation of a means test, would be grossly unfair. Many of this class undoubtedly would forego needed assistance which had to be purchased at that sacrifice, not only by themselves but also by their relatives.[97]

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[95] See, generally, *Report of Departmental Committee on Old Age Pensions* (London, 1919), pp. 9–10; *International Labour Conference* (Geneva, 1933), p. 121.

[96] Sen. Rep. No. 628, *supra*, p. 6; Bakke, *Insurance or Dole*, pp. 193–194.

[97] See Kiehel, *Unemployment Insurance in Belgium* (1932), p. 193; Hohman, *British Social Insurance and*

Purely as a matter of administration, a rigid means test under Title II would create an enormous problem. To be effective, it requires constant investigation of all of the property and income, not only of the applicant, but also of all those under an obligation to support him. In addition, the information must be verified from all possible sources. An indication of the administrative problem may be gathered from the fact that 5,000 investigators were required to administer a means test under the British Unemployment Assistance Act to 749,105 applicants and discovered from that total only 36,595 who were actually disqualified.[98] It goes without saying that the more effectively the test is applied, the more costly its administration, the more severe its humiliation, and the greater its discouragement of thrift. To the degree that the test is loosely applied, fraud is encouraged.[99]

Moreover, the gearing of the amount of benefits to employment and wages has the positive merit of promoting industry of workers. The greater the industry of the worker and the more he earns during his lifetime, the larger the benefits that will be

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Minimum Wage (1932), p. 235; Workuston, E., and Butler, C., *Disallowed: The Tragedy of the Means Test* (London, 1935); Burns, *Toward Social Security* (1936), p. 140.

[98] *Report of Unemployment Assistance Board* (1936), pp. 20, 76–78.

[99] *Report of Unemployment Assistance Board*, *supra*, p. 20; Folke, *Making Relief Respectable*, Annals of Am. Acad. of Political and Social Science (Nov. 1934), p. 158–159.

paid to him. This method of determining eligibility and the amount of benefits parallels the present incentives to industriousness. See p. 82, *infra*.

There can be no question of the power of Congress to decline to impose any means test. In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, this Court said, in sustaining the Washington workmen's compensation law (p. 240):

> It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the Fourteenth Amendment.

See also *Chamberlain* v. *Andrews*, 271 N. Y. 1; *Howes Bros.* v. *Mass. U. C. Commission* (Mass. Sup. Jud. Ct.), decided December 30, 1936, 5 N. E. (2d) 720 (not officially reported); *Beeland Wholesale Co.* v. *Kaufman* (Ala. Sup. Ct.), decided March 17, 1937.

b. Size and time of payment of benefit payments

The Act provides that there shall be paid to qualified individuals over 65 years of age monthly benefits not to exceed $85 per month,[1] measured by a

[1] Until 1965 the number of monthly benefits 70-85 is not expected to exceed 0.05% of the monthly benefits paid. In

weighted percentage of the total wages paid over a beneficiary's years of work, wages to include only the first $3,000 of wages earned in any one year from any one employer [Section 210 (a)]. Both the age limit and the weighted scale of benefit payments are, we submit, eminently reasonable.[2]

The choice of 65 years of age for the beginning of benefits is based on both American and European experience. The retirement age in private American plans is predominantly 65, with 60 as the next most common age;[3] in state pension plans the balance between 65 and 70 is almost even.[4] Other Federal plans set the retirement age at from 62 to 70.[5] In foreign countries 65 is the most usual age,

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1980, it is estimated not to exceed 3.3%. From 1945–1955, the highest percent of benefits paid will range from $10–$25; from 1955–1975 it will range from $25–$40. In 1980 it is estimated that 15.7% of benefits will range from $10–$25, 26.9% from $25–$40, 35.8% from $40–$55, 18.3% from $55–$70, and 3.3% from $70–$85.

[2] The date of December 31, 1936, from which calculations of wages are to be made (Section 202 (a)) was necessary to allow sufficient time for proper wage records to be set up. The minimum sum of $2,000 over a period of 5 years upon which to base a benefit (Section 210 (c)) was necessary to justify the cost of administration.

[3] Latimer, M. W., *Industrial Pension Systems*, *supra*, p. 504, Table 9.

[4] Hearings on H. R. 4120, House Committee on Ways and Means, 74th Cong., 1st Sess., p. 78, Table 15; Sen. Rep. No. 628, *supra*, p. 5.

[5] Retirement of civil service employees—60–70. Act of May 29, 1930, c. 349, 46 Stat. 468, sec. 1 (U. S. C., Title 5, sec. 691). Army—62–64. Revised Statutes, sec. 1244 (U. S. C., Title 10, sec. 944); Act of June 30, 1882, c.

with many plans using a retirement age between 50 and 60.[6] The provision setting a maximum rate is justified by similar precedents.[7]

The measurement of benefits by wages and length of service[8] is also based on precedent both here and abroad. Length of service is a factor widely used in private industrial plans,[9] and is common in foreign statutes.[10] Measurement of benefits by wages is even more common, due to the encouragement which it gives to thrift and industriousness.[11]

254, 22 Stat. 118 (U. S. C., Title 10, sec. 945). Navy—64–70. Revised Statutes, sec. 1444, as amended (U. S. C., Title 34, sec. 384); Act of July 1, 1918, c. 114, 40 Stat. 704, 709 (U. S. C., Title 34, sec. 396).

[6] *Public Old-Age Pensions and Insurance in the United States and in Foreign Countries* (U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 561), p. 98, Table II; *Compulsory Pension Insurance* (International Labour Office, Studies and Reports, Series M, No. 10), p. 212.

[7] See authorities cited in footnotes 4, 6, *supra*.

[8] See Appendix, p. 64, Table 1.

[9] Latimer, M. W., *Industrial Pension Systems* (1932), p. 105, Table 18.

[10] *Compulsory Pensions Insurance*, *supra*, p. 216 *et seq.*

[11] American Workman's Compensation and unemployment compensation plans, both public and private, overwhelmingly adopt wages as a measure for benefits, and wages are widely used in foreign plans for old age pensions, unemployment insurance, and health insurance. *Public Old-Age Pensions in the United States and in Foreign Countries* (U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 561), p. 98, Table 2; *Unemployment Benefit Plans in the United States and Unemployment Insurance in Foreign Countries* (U. S. Dept. of Labor, Bureau of

Moreover, in a national plan of benefits, relationship to wages fulfills a function which deserves emphasis It relates benefits to past standards of living. Thus it automatically adjusts payment to prevailing and differing standards of living in different parts of the United States, and in communities of different sizes. Yet this principle has not been carried to an extreme. Benefits have been weighted in favor of the lower wage groups, so that persons presently in middle age will not be discriminated against by having small total wages earned after December 31, 1936. This weighting also has the merit of assuring those who have worked for a comparatively long period of years for a small wage that they will receive a sufficient benefit to obtain a fair measure of independence.

c. The lump sum payments under sections 203 and 204

The provision of Section 203 (a), by which the estate of an individual who dies before attaining the age of 65 is paid a sum proportioned to the amount of wages the individual has earned is soundly designed to promote the fairness of the benefits. The payment is clearly incidental to the major plan of Title II,[12] but serves to ameliorate,

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Labor Statistics, Bulletin No. 544), pp. 27–78, 183–360; *Health Insurance* (Metropolitan Life Ins. Co., Monograph III), Chart I.

[12]Assuming 17–19 as the average age at which a worker will enter industry, approximately two-thirds of all workers will attain the age of 65. Dublin and Lotka, *Length of*

at least in part, the financial crisis and distress in the average family of low income when the income of the breadwinner ceases by reason of death. Moreover, the provision assures the worker that in distributing benefits the Government will give appropriate recognition to the part he has played in financing the Government by paying taxes under Title VIII.[13]

The other two provisions for lump sum payments are merely for convenience of administration. Ordinarily, administrative errors or delays in payment of benefits may be adjusted by increasing or decreasing subsequent benefits [Section 202 (c)], but in the event that an individual dies before an adjustment of an underpayment can be made in this way, a lump sum may be paid to his estate pursuant to Section 203 (c).[13a] Finally, for convenience in administration, if an individual has not worked for at least one day in each of five separate years since 1936, or has not earned a total of $2,000, there is paid to him or to his estate, instead

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Life (1936) pp. 14–16. Thus most of the benefits under Title II will be old age monthly pensions, not lump sum payments. Moreover most of the money paid under Title II will be for monthly benefits not lump sum payments. See Appendix, pp. 78–79, Tables 14, 15.

[13] The same considerations justify Section 203 (b), by which a person who, having become entitled to benefits upon reaching 65, dies before having received in monthly pensions an amount equal to 3½ percent of the wages paid him after January 1, 1937.

[13a] The converse situation, when an individual dies before an adjustment of an *overpayment* can be made pursuant to Section 202 (c) is covered by Section 206.

of a very small monthly benefit payment, a lump sum equal to 3½ percent of the wages he has earned between January 1, 1937, and the time he attained 65. Section 204 (a), (b).

d. Exclusions

At the outset, it should be noted that Congress is not required to reach every person who may be in need. As this Court said in *Miller* v. *Wilson*, 236 U. S. 373, 384:

> Dealing with practical exigencies, the legislature may be guided by experience. * * * It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.

See also *Sproles* v. *Binford*, 286 U. S. 374, 396; *Silver* v. *Silver*, 280 U. S. 117, 123; *West Coast Hotel Co.* v. *Parrish*, No. 293, March 29, 1937. However, even assuming that the various exclusions from the grant of benefits are subject to a test as rigorous as those of a regulatory statute, we submit that they are completely justified.

The inclusion of agricultural and domestic labor [Section 210 (b) (1) (2)] would have involved tremendous practical difficulties. No records of wages are usually kept; wages are, in large part, in food, lodging, or, in the case of agricultural labor, percentage of produce. With respect to agricultural labor, contracts with tenants involving widely diverse provisions with regard to labor, seed, animals, machinery and crops would have

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created difficulties in determining whether an employee or an independent contractor relation existed. Casual labor [Section 210 (b) (3)] would also have involved difficulty in maintaining adequate records. Low wages and intermittent employment might render the benefits less adequate than assistance under Title I. Moreover, neither the agricultural worker nor the domestic servant is exposed to that aspect of the problem of indigent old age which is peculiar to the urban, industrial civilization.[14] Similar exclusions are customarily found in workmen's compensation acts (See *New York Central R. R.* v. *White*, 243 U. S. 188, 208) and their exclusion in old-age benefit systems is confirmed by foreign experience.[15]

Seamen [Section 210 (b) (4)] were excluded because the act contemplates benefits only for those employed within the United States [Section 210 (b)]; indeed, seamen have frequently been accorded a separate classification. Revised Statutes, Sec. 4501, as amended (U. S. C., Title 46, sec. 541); Act of March 4, 1927, c. 509, 44 Stat. 1424 (U. S. C., Title 33, c. 18). Most Federal employees [Section 210 (b) (5)] are already covered by a pension system,[16] and employees of States [Section 210 (b) (6)] are excluded because of an unwillingness of Congress to intermeddle in the affairs of a State by pensioning its employees. Similarly, the ex-

[14] See pp. 52–62, *supra*.

[15] *Compulsory Pension Insurance*, *supra*, p. 32 *et seq.*

[16] See note 5, p. 81, *supra*.

clusion of employees of charitable, educational, and other such organizations [Section 210 (b) (7)] is traditional.

The exclusion of the regularly employed aged [Section 202 (d)] is equally justifiable.[17] Such persons are presumably self-supporting, and in no need of benefits, and their exclusion materially reduces the expenditures under the statute.[18] Nor does the provision violate the Tenth Amendment. No compliance is "purchased", within the meaning of *United States* v. *Butler,* 297 U. S. 1. See pp. 95–102, *infra.*

Finally, taken as a whole, those excluded from the benefits of Title II are also excluded from payroll taxation. It has long been recognized that in classifying for the purposes of taxation, account may be taken of benefits received. *Norwood* v. *Baker,* 172 U. S. 269; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Chicago, Burlington, &c. R'd* v. *Chicago,* 166 U. S. 226. It is equally reasonable in classifying for the purpose of ~~making~~ paying benefits to take account of taxes paid.

IV

Since Title VIII and Title II Severally Constitute Valid Exercises of Congressional Power, They Are Not Invalid When Considered Jointly

We have shown previously that the imposition of taxes by Title VIII constitutes a valid exercise of

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[17] See pp. 77–78, *supra.*

[18] Sen. Rep. No. 628, *supra,* p. 10.

the taxing power of Congress and that the payment of benefits provided in Title II constitutes a valid exercise of the power of Congress to provide for the general welfare as granted in Clause 1 of Section 8 of Article I of the Constitution. It is contended, however, that even though these Titles are valid exercises of federal power when severally considered, they nevertheless become invalid if considered jointly as parts of a plan. The short answer to this contention is that it has never been supposed that a legislative act which is validly based in each of its parts on a granted power can be rendered invalid because of the combination of the separately valid parts. The constitutional propriety of basing a statute upon an aggregate of federal powers was sustained in *McCulloch* v. *Maryland*, 4 Wheat. 316, and has never since been doubted. Recently this Court pointed out that, "The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress * * *." *Norman* v. *Baltimore and Ohio R. R. Co.*, 294 U. S. 240, 303. Nor is it at all significant that the joining together of several valid exercises of federal power results in a legislative plan which bears a resemblance to some activity ordinarily engaged in by private persons. Thus in the Act sustained in *McCulloch* v. *Maryland, supra,* the resultant of the Congressional exercise of aggregate powers was the establishment of a bank.

A detailed examination of respondent's contention will show its fallacy. It is argued that the joint exercise of the valid powers to tax and appropriate renders both parts of the statute invalid in that (A) the use of the avails of the tax to finance the expenditures contemplated under Title II deprives the tax of its quality as a tax and characterizes it as an unconstitutional exaction, and that (B) Titles II and VIII taken together constitute a plan which is regulatory in manner and therefore violative of the Tenth Amendment.

A. THE TAXES IN TITLE VIII ARE NOT RENDERED INVALID BECAUSE LEVIED TO RELIEVE A DRAIN ON THE TREASURY OCCASIONED BY THE EXPENDITURES UNDER TITLE II

The contention that the taxes imposed by Title VIII are rendered invalid because of some connection with the benefits provided in Title II appears to have two aspects: (1) that the taxes are not true taxes because the avails are said to be earmarked; (2) that the taxes are not true taxes because the avails are said to be devoted to the benefit of a particular group.

1. It has already been shown that the avails of the tax are not in fact earmarked for any purpose. See Points I and II, *supra*, pp. 31–45. Congress may use the avails for any desired purpose. The direction contained in Section 201 of the Act constitutes only an authorization to appropriate and not an appropriation. However, even if the avails

were in fact earmarked, the taxes would still be taxes within the meaning of the Constitution. A tax is no less a revenue measure because imposed to raise revenue for a specific purpose. The Constitution itself specifies the uses for which taxes may be levied (Article I, Section 8, Clause 1) and this Court has recognized that the relationship between taxation and expenditure is a normal and necessary incident of the legislative function. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620. There can be no objection if an act levying a tax also specifies the uses to which the avails are to be put, if those uses are within the purposes permitted by the Constitution.[19]

2. It is said, however, that the taxes imposed by Title VIII are not taxes in the constitutional sense but are mere expropriations of one group for the benefit of another, since it is contemplated that the funds derived from taxing employers and employees will be devoted to paying benefits to employees.

The answer to this contention is found in the clear language of Clause 1 of Section 8 of Article I of the Constitution which, as this Court has said, grants "the power to tax for the purpose of providing funds for the payment of the nation's debts

[19] A more elaborate discussion of this point is contained in the Brief for the United States in *Cincinnati Soap Co.* v. *United States*, No. 659, October Term, 1936, pp. 28–33, to which this Court is respectfully referred.

and making provision for the general welfare." *United States* v. *Butler*, 297 U. S. 1, 64. If, then, the payment of benefits under Title II is an expenditure for the general welfare, then a levy for the purpose of providing funds for such expenditure must *ipso facto* be a tax within the meaning of the Constitution.[20] Certainly the levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government.

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[20] Of course, a levy which provides funds for the general welfare may not be a true tax if it lacks one of the characteristics expressly required by the Constitution, *e. g.*, uniformity. In such case the supposed tax will be upheld only if it is a proper exercise of some other granted power. For this reason the Court in *Head Money Cases*, 112 U. S. 580, entered into an inquiry as to whether the tax there under consideration could be supported as a valid exercise of the power to regulate foreign commerce. It is to be noted, however, that the Court did not hold that the levy was not a valid tax. It may be that the Act was valid under either the taxing or the commerce powers. By the same token, the protective tariff is valid either as an exercise of the taxing power, *Hampton & Co.* v. *United States*, 276 U. S. 394, or of the commerce power. *Board of Trustees of the University of Illinois* v. *United States*, 289 U. S. 48. See also *Veazie Bank* v. *Fenno*, 8 Wall. 533. Since the taxes imposed by Title VIII do not violate either the canon of uniformity, or the prohibition against levying a tax on a State instrumentality, or any other constitutional limitation, and since (even if they be regarded as though they were earmarked) they are imposed for the purpose of providing funds for a general welfare expenditure, they must of necessity be true taxes.

The charge that the Act is an expropriation from one group for the benefit of another is obviously without substance. The determination that the expenditures are for the general welfare is a determination that they are for the benefit of the taxpayers as well as for the benefit of the direct recipients of the expenditures. A tax does not cease to be one for the general welfare because the application of the proceeds is to one group of the population.

It would seem obvious that the employees' tax in Title VIII would not cease to be a true tax even if the proceeds were to be devoted in the first instance to the employees themselves. If the law were otherwise, a gasoline tax, the proceeds of which were devoted to the construction of highways (thus benefiting motorists), would not be a true tax. Compare *Clark* v. *Poor*, 274 U. S. 554, in which a tax on motor carriers to provide funds for maintenance and repair of highways was upheld. It is not material that the avails of the tax are applied in the form of money rather than in the form of services. *Gillum* v. *Johnson* (Calif. Sup. Ct.), 62 P. (2d) 1037, 1044, not officially reported; *Beeland Wholesale Grocery Co.* v. *Kaufman*, decided by the Supreme Court of Alabama, March 17, 1937.

Nor is the employers' tax any the less a true tax if the avails from that excise are viewed as if they were devoted to financing the expenditures under Title II. "The constitutional power to levy taxes

does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation." *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268; *Carley & Hamilton* v. *Snook,* 281 U. S. 66; *St. Louis & Southwestern Ry. Co.* v. *Nattin,* 277 U. S. 157, 159. The levy of taxes upon one group to provide proceeds for expenditures for the primary benefit of another group is a familiar and ancient exercise of the power of taxation.[21] Indeed (as Prof. E. R. A. Seligman has pointed out in his *Essays on Taxation* (9th ed., 1923, p. 53), the whole system of local taxation in England has been developed from the so-called "poor rates" by which a tax is laid on occupiers of land to raise money to give to the handicapped poor and to set the ablebodied poor to work. 43 and 44 Eliz. c. 2 (1601); Halsbury's *Laws of England,* vol. 22, p. 521 *et seq.,* vol. 24, p. 1 *et seq.* Another example of a tax on one group to be expended for another group is the Massachusetts statute imposing income taxes for the express purpose of providing schools, upheld in *Knights* v. *Jackson,* 260 U. S. 12. The recent depression has called for a host of special local taxes such as sales taxes and special taxes on utilities for the purpose of providing funds for relief. See, *e. g.,* New York

[21] An early example is the enactment of the Maryland legislature in 1822 providing for the assessment of an annual fee of five dollars upon all lawyers in the state, the proceeds being earmarked for a pension to be paid to Luther Martin. Maryland Laws, December Session 1821, Resolution No. 60.

Laws of 1933, c. 815. *Southern Boulevard R. Co.* v. *City of New York*, 86 F. (2d) 633 (C. C. A. 2d). Reference may again be made to the state unemployment compensation laws. *Gillum* v. *Johnson; Beeland Wholesale Grocery Co.* v. *Kaufman*, both *supra*. All these are instances of the cardinal principle that a levy is a valid tax if its purpose is to provide funds for a valid expenditure. If the expenditure be within its powers the legislature may choose the subjects of the tax as it desires and if the tax falls on a class other than the class comprising the recipients of the funds, the tax is no more an invalid expropriation than if its proceeds were used to support any other governmental activity. To illustrate: a tax on employers or on any other class to finance relief expenditures for the sufferers from an earthquake or to finance a pension for the widow of a President of the United States would unquestionably be valid.

B. TITLES II AND VIII JOINTLY CONSIDERED DO NOT CONSTITUTE AN INVALID REGULATORY SCHEME

Even though Titles II and VIII are valid separately considered, it is contended that they are invalid when considered together because they are said to constitute a regulatory scheme. The precise nature of this contention is not easily determined. It may be contended that the Act constitutes a regulation of employment in that it requires or induces retirement from employment, that the Act constitutes a scheme for compulsory insurance in-

valid under the Tenth Amendment, or that it constitutes a regulation of wages.

It is obvious from the face of the Act that it in no way constitutes a regulation of employment. The Act not only does not require retirement from employment, but it has no significant tendency to induce it. Indeed, since neither the employer nor the employee tax is levied with respect to an employee after the age of 65, the employment opportunities of elderly people will be increased. If the employee continues to work in a covered employment after attaining the age of 65 he will not be entitled to receive a benefit for any month in which he is employed, *but he suffers no reduction whatever in future benefits.* Thus he may continue to work as long as he desires or is able to without any fear of loss or diminution of benefits when he eventually retires or loses his job. On the other hand, since the benefits paid under Title II are small (in no case may they exceed $85 per month) and are proportioned to wages earned in the past, they constitute little if any incentive to retire.

The further contention that might be made is that the Act is regulatory in nature because it constitutes a plan for compulsory insurance. Whether or not the Act does provide an insurance plan within the accepted meaning of the term "insurance" is a doubtful question. It is to be noted that the correlation between taxes paid and benefits received is far from complete. As the Execu-

tive Director of the Committee on Economic Security has pointed out, the Act favors the workers who at this time are already middle aged or over and those whose rate of pay is small. (Witte, *Old Age Security in the Social Security Act,* 45 Journal of Political Economy, at p. 13.) Thus some of the taxpayers receive benefits greater than the amount of taxes paid with respect to them. On the other hand, some taxpayers will receive benefits smaller than the amount of taxes paid with respect to them, plus interest, since the maximum benefit payable under Title II is $85 per month. Moreover, the Act creates no contractual obligation with respect to the payment of benefits. This Court has pointed out the difference between insurance which creates vested rights and pensions and other gratuities involving no contractual obligations in *Lynch* v. *United States,* 292 U. S. 571, 576–577:

> War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army or navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller,* 107 U. S. 64, 68; *Frisbie* v. *United States,* 157 U. S. 160,

> 166; *United States* v. *Cook*, 257 U. S. 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

But whether or not the plan of the Act may properly be designated as old age insurance is in our view completely immaterial. A statute which involves nothing more than a valid exercise of the taxing power and a valid unconditional expenditure of benefits for the general welfare having no regulatory incidents must of necessity be valid whether the plan be labelled as insurance or not. In the statute considered in *McCulloch* v. *Maryland*, 4 Wheat. 316, the federal government through a valid exercise of its fiscal powers engaged in the business of banking. Here the federal government is certainly not entering into business, and if its activity can be designated "insurance", that fact is no more destructive of the validity of its exercise of its taxing and spending powers than was the designation of "bank" to the resultant of the exercise of powers in *McCulloch* v. *Maryland*. Since Congress has done nothing more than validly exercise two of its granted powers, the Tenth Amendment has no application. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330.

Respondent contends that Title VIII "is an attempted statute to regulate the wage relation between employers and employees in employment within the several States * * *. It is a regulation of the terms of employment whereby the employer must as a part of the wage contribute something more for the old age of the employee" (Br. 59, 60). This contention is based on a false factual premise and upon unsound reasoning.

In making this contention respondent must be proceeding on the assumption that the Act constitutes an enforced addition by an employer to the wages of *his* employees. In the first place, it is manifest on the face of the statute, that the employer tax is not an enforced addition to wages at all. Even if it could in any case be an addition to wages, it is entirely within the control of the employer as to whether it should be added to wages or not. The statute does not prevent the employer from lowering the wages of his employees *pari passu* with the tax. Consequently, if in particular cases an addition to wages would result it would not be an *enforced* addition, and since it is not enforced it cannot possibly be a regulation.

In the second place, the employer tax does not constitute an addition by an employer to the wages of *his* employees. After the Act comes into full operation in 1949, many, and possibly all, of *his* employees may get nothing more than the equivalent of what they themselves paid in taxes plus in-

terest, although it is of course true that many employees will get more than such equivalent amount. All employees who die before reaching the age of 65, and all employees who work for less than 5 years after January 1, 1937, and all employees who receive total wages of less than $2,000 after January 1, 1937, will get only 3½ per cent of the wages received by them (Section 203 (a); Section 204 (a)). Moreover, many employees will not live a sufficient length of time to draw total benefits exceeding the amounts paid in by them as taxes plus interest. It follows that it is entirely speculative how many, if any, of the employees of a particular employer will receive in total benefits more than the equivalent of the amounts paid in taxes by the employees themselves plus interest.[22] Under these circumstances, it is nothing more than a play on words to speak of the Act as a "regulation" of the wage relationship.

Petitioner may contend, further, that even if the Act does not constitute a regulation of the wage relationship between an employer and his employees, it is nevertheless a regulation of the wage relationship between employers as a class and employees as a class. Putting aside the question as to whether there can be said to be a "wage rela-

[22] So much of the Old Age benefits as are attributable to interest will be met by the Old Age Reserve Account from the interest earned on the bonds held by it. Interest on these bonds will be paid like interest on other Government bonds and from the same sources.

tionship" between these two classes, it is manifest that there is no regulation in any sense because, as we have shown, there is no *enforced* addition to wages, since the employer class is legally free to recoup itself from the employee class.

Moreover, if the tax be a true tax, as we have shown earlier, it is immaterial that it affects the *financial* relationship between the two classes, *i. e.*, that employees as a class will receive more money than they would have received were it not for the statute. Compare *Barwise* v. *Sheppard*, 299 U. S. 32, 40–41.

We have shown earlier that the purpose of Title II of the Act is to pay benefits to aged persons, and that this purpose is within the granted power of Congress to make expenditures for the general welfare. Respondent now contends that, however valid the end of the statute may be, it becomes an unconstitutional regulation of the wage relationship merely because of the method of financing the expenditures. But if Congress may spend for the general welfare, it has a free choice of the means to be adopted for raising the funds provided that the means be not prohibited by the Constitution. "To a constitutional end many ways are open." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291. Again we say, if the taxes of Title VIII are valid taxes, and if the expenditures of Title II are valid expenditures, the combination of the two cannot render the whole invalid.

It is true, of course, that the States themselves might, as a matter of law, lay similar taxes and make similar expenditures (although the States as a matter of economics have been unable to do so. See pp. 70–72, *supra*). But it cannot be contended that the tax and expenditures are, therefore, forbidden to the Federal Government. The same subjects of tax and objects of expenditure may be open to the States as well as to the Federal Government. Indeed, where the object of the expenditure is the general welfare of the United States it is presumably also, from the point of view of an individual State, for a public purpose. It cannot be doubted, for example, that grants for the relief of distress are within the power of Congress and the States alike. What was said in *Hoke* v. *United States,* 227 U. S. 308, 322, is particularly relevant with respect to the powers of taxation and expenditure:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

These reasons make it clear that *United States* v. *Butler,* 297 U. S. 1, has no application here. There both the tax and the expenditure were deemed

to be regulatory in purpose and effect. The Court pointed out that a tax went into effect automatically when the Secretary of Agriculture determined that rental or benefit payments were to be made and was to cease when the payments ceased; the rate was fixed "with the purpose of bringing about crop-reduction and price-raising" (297 U. S. at 59). The expenditures were made only if the recipient entered into a contract to reduce his acreage. Here the recipient of the expenditure makes no contract and need follow no specified course of conduct.

Nor is *Railroad Retirement Board* v. *R. Alton R. Co.*, 295 U. S. 330, applicable. The statute there considered was enacted in the exercise of the power to regulate interstate commerce. The preamble stated its purpose to be the promotion of efficiency and safety of interstate transportation. It was not considered to be a taxing act by Congress, no attempt was made to base it on the taxing power, and it was considered by this Court solely on the basis of the commerce clause.[28] Moreover, the Railroad Retirement Act was clearly a regulation on its face. Section 4 of that Act provided in terms that retirement should be compulsory upon employees who attained the age of sixty-five. (The date

[28] This Court has held that a statute invalid if enacted under one of the federal powers may be valid if enacted under another appropriate power and limited in accordance with that power. Compare *Hill* v. *Wallace*, 259 U. S. 44, with *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

of retirement could be postponed in certain cases but not beyond the age of 70.) This provision was one of the essential features of the Act since one of its announced purposes was "to make possible greater employment opportunity and more rapid advancement of employees in the service of the carriers." We have already pointed out that the statute at bar not only does not require retirement from employment, but does not even induce retirement since a man may continue to work after 65 without any future reduction of benefits.

Moreover, the Railroad Retirement Act conferred express power on the administrative agency to substitute the statutory pension plan for existing voluntary pension plans of the carriers. This again was clearly regulatory. The statute at bar does not interfere with existing voluntary pension plans. In fact, large industrial enterprises have found it altogether feasible to correlate their pension plans with the benefit payments provided in Title II.[24]

Lastly it should be observed that the Railroad Retirement Act was held violative of the due process clause of the Fifth Amendment upon various grounds, none of which is here present.

In the opinion of the court below reference was made to a decision of the Supreme Court of Canada holding the Canadian Employment and Social In-

[24] See Wyatt, Birchard E., *Private Group Retirement Plans* (1936).

surance Act (25 and 26 Geo. V., c. 38) to be *ultra vires* the Dominion Parliament. *Reference re: The Employment and Social Insurance Act* [1936] S .C. R. 427, affirmed by the Judicial Committee of the Privy Council, *Attorney-General of Canada* v. *Attorney-General of Ontario,* Privy Council Appeal, No. 101 of 1936. It is to be noted that the Canadian Act was not intended by Parliament to be a taxing act; the preamble stated that it was enacted to discharge the obligations of the Dominion under the Treaty of Versailles. Indeed the Dominion powers of taxation and appropriation "were only faintly advanced by counsel for the Dominion in favor of the legislation." [1936] S. C. R., at 452. The Canadian Act expressly provided that the employer's contribution could not be deducted from the wages of the employee (Second Schedule, Part II, par. 8). To that extent perhaps it could be said that the Act was a regulation of contracts of employment. We have already pointed out that the Act at bar leaves the employer legally free to lower or raise wages as he desires. It should also be pointed out that an Old Age Pensions Act, whose validity does not appear to have been questioned, has been in force in Canada for a number of years. Revised Statutes of Canada, Chap. 156.[25]

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[25] The basic differences in structure between the British North America Act and the United States Constitution require that great caution be used in resorting to analogies from Canadian constitutional law. The British North America Act contains no general welfare clause such as is

V

These Taxes Do Not Contravene the Fifth Amendment

In Point IV, *supra*, pp. 87–104, we have disposed of the contention that Titles II and VIII taken together violate the Fifth Amendment by reason of the alleged taking of property from one class for the benefit of another. There remain two issues to be considered in the light of the due process clause. First, it may be urged that the selection of the specified employments for taxation is capricious, and second, that it is arbitrary to limit the tax to the first $3,000 of wages.

---

contained in Article I, Section 8, clause 1 of our Constitution. While the Dominion Parliament has a residual power to legislate "for the peace, order, and good government of Canada", this general residual authority is sharply limited by the express grant of numerous *exclusive* powers to the Provinces. For illustrations of the special problems raised by the British North America Act see *Russell* v. *The Queen*, 7 A. C. 829; *John Deere Plow Co.* v. *Wharton*, 18 D. L. R. 353, [1915] A. C. 330; *Attorney-General for Canada* v. *Attorney General of Alberta* [1916], D. L. R. 288. Canadian constitutional law constitutes a system very different from our own and the words of Mr. Justice Holmes, with reference to Spanish law, in *Diaz* v. *Gonzales*, 261 U. S. 102, 106, are highly pertinent:

"When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books."

As a result of the definitions in Section 811 (b), various types of employment, such as agricultural labor, domestic service in a private home, and for charitable institutions are not subject to tax. There is no violation of due process in these selections. "In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Sonzinsky* v. *United States,* No. 614, March 29, 1937. Further authorities that selections of the subjects for taxation are not open to judicial scrutiny are collected in the brief for the Collector in No. 837, *Steward Machine Co.* v. *Davis,* pp. 60–63.

But even if it be necessary to find affirmative justification for these exclusions, it appears upon examination that they are reasonable, in the main predicated upon considerations of administrative convenience, and are of the type long familiar in our internal revenue laws. See *Steward* brief, pp. 63–65, for collection of authorities.

The exemption as to agricultural labor [Sec. 811 (b) (1)] is plainly founded upon administrative policy. The difficulties involved in requiring the maintenance of proper records, the fact that farm laborers often receive a substantial portion of their wages in board and lodging the value of which could not readily be determined, the fact that a considerable amount of farm labor is seasonal and migratory—these considerations plainly justified

Congress in excluding agricultural employment from Title VIII.

Similar considerations are present in the case of domestic service in a private home. Section 811 (b) (2). In addition, it would often be difficult to determine when the employer-employee relationship exists, as when relatives of various degrees live with the family and assist with household duties. Further the spread of domestic service is so wide and the amount of tax realizable so small that enforcement of the tax might be impossible except at a prohibitive cost. Like factors are dominant in the case of casual labor not in the course of the employer's trade or business. Section 811 (b) (3).

The exemption of service performed by persons who have attained the age of sixty-five [Sec. 811 (b) (4)] is probably accountable for by the fact that most wage earners have passed the peak of their earning power at that age, and are presumably less able to pay a tax. Congress undoubtedly wished to lift the burden under those circumstances.

The exclusion of services performed by seamen on documented vessels was founded upon administrative policy.[26] Section 811 (b) (5). Such ves-

[26] The report of the House Committee on Ways and Means states (H. Rep. No. 615, 74th Cong., 1st Sess., p. 22):

"The administrative difficulty of following the wages of officers and seamen of crews was regarded as almost insurmountable. For instance, unless this exclusion were made, it would be necessary to keep track of the wages of Chinese coolies working on American ships."

sels are generally registered for foreign trade or enrolled or licensed for the coasting or fishing trade (c. 250, 41 Stat. 988, 1000), and the difficulty of determining to what extent services performed on such vessels are within the United States is obvious.

The remaining exemptions [Sec. 811 (b) (6), (7), and (8)] deal with service in the employ of the United States, a state or political subdivision thereof, and certain specified organizations of a charitable character. These are identical with the ones involved in the *Steward* case, and are commented upon in our brief therein at pp. 63–64.

Moreover, all the exemptions from the taxes imposed by Title VIII are given to persons who receive no benefits under Title II. It has long been recognized that in classifying for the purpose of taxation, account may be taken of benefits received. *Norwood* v. *Baker,* 172 U. S. 269; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Chicago Burlington &c. R'd.* v. *Chicago,* 166 U. S. 226.

Nor is there any violation of due process in the provisions of Section 811 (a) which fix a limit of $3,000 to the taxable wages of any individual. Aside from the fact that neither respondent nor his corporation may challenge this classification since it obviously cannot injure them (*Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55; *Premier-Pabst Co.* v. *Grosscup,* 298 U. S. 226), it

is clear that Congress has as complete discretion in determining how far it will exercise the taxing power as it has in selecting the subjects of taxation. Blanket exemptions of fixed amounts have appeared in numerous revenue laws and their presence has never been fatal. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Knowlton* v. *Moore*, 178 U. S. 41; *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397. The operation of an exemption above a specified amount should be no more objectionable.

That Congress may tax part of the employee's income in a specified manner without taxing all of it the same way is settled by *United States* v. *Hudson*, No. 97, January 11, 1937. There is even more justification here than in the *Hudson case* for treating this income specially. By exempting income in excess of $3,000, double taxation is, in general, avoided. Through the operation of the $2,500 credits as well as additional credits for dependents and earned income (see, *e. g.*, Sec. 25 of the Revenue Acts of 1934 and 1936), income under $3,000 is usually exempt under the general income tax law. While it is true that there may be some overlapping or some gaps at the dividing line, the avoidance of double taxation is achieved as a practical matter by exempting wages over $3,000 in Title VIII. *Hennefard* v. *Silas Mason Co.*, No. 418, March 29, 1937; *Colgate* v. *Harvey*, 296 U. S. 404, 419–422. And the existence of slight in-

equalities at the dividing line is surely not constitutionally objectionable. Cf. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Salomon* v. *State Tax Commission*, 278 U. S. 484.

Moreover, there is no objection to the $3,000 limit in measuring the excise upon employers. Plainly Congress could have fixed a *flat* rate of $30 per employee upon the exercise of the taxable privilege. Cf. *Sonzinsky* v. *United States*, No. 614, March 29, 1937; *Hylton* v. *United States*, 3 Dall. 171; *State Board* v. *Young's Market Co.*, 299 U. S. 59. Such tax would have been mathematically equal to the maximum tax now imposed by Title VIII for the year 1937 (i. e., 1% of $3,000). There is, therefore, nothing arbitrary in lowering the burden where the wages are less. Cf. *Clark* v. *Titusville*, 184 U. S. 329; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 81;[27] *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61.

CONCLUSION

Wherefore it is respectfully submitted that the taxes imposed by Title VIII are valid in every respect, and that the judgment of the Circuit Court of Appeals should be reversed and the cause re-

[27] The *Baltic Mining Co.* case has been overruled on another point (*Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218), but its authority on this point has remained unimpaired.

manded with instructions to enter judgment in favor of petitioners.

Respectfully submitted.

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No. 910

In the Supreme Court of the United States

OCTOBER TERM, 1936

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, AND THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, ET AL., PETITIONERS

v.

GEORGE P. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO BRIEF FOR PETITIONERS HELVERING AND WELCH

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APPENDIX A

THE SOCIAL SECURITY ACT (ACT OF AUGUST 14, 1935, c. 531, 49 STAT. 620, U. S. C., SUPP. II, TITLE 42, C. 7)

[H. R. 7260]

AN ACT To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GRANTS TO STATES FOR OLD-AGE ASSISTANCE

APPROPRIATION

SECTION 1. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to aged needy individuals, there is hereby authorized to be appropriated for the fiscal year ended June 30, 1936, the sum of $49,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by

the Social Security Board established by Title VII (hereinafter referred to as the "Board"), State plans for old-age assistance.

STATE OLD-AGE ASSISTANCE PLANS

SEC. 2. (a) A State plan for old-age assistance must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for old-age assistance is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and (7) provide that, if the State or any of its political subdivisions collects from the estate of any recipient of old-age assistance any amount with respect to old-age assistance furnished him under the plan, one-half of the net amount so collected shall be promptly paid to the United States. Any pay-

ment so made shall be deposited in the Treasury to the credit of the appropriation for the purposes of this title.

(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for old-age assistance under the plan—

(1) An age requirement of more than sixty-five years, except that the plan may impose, effective until January 1, 1940, an age requirement of as much as seventy years; or

(2) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided therein continuously for one year immediately preceding the application; or

(3) Any citizenship requirement which excludes any citizen of the United States.

PAYMENT TO STATES

SEC. 3. (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for old-age assistance, for each quarter, beginning with the quarter commencing July 1, 1935, (1) an amount, which shall be used exclusively as old-age assistance, equal to one-half of the total of the sums expended during such quarter as old-age assistance under the State plan with respect to each individual who at the time of such expenditure is sixty-five years of age or older and is not an in-

mate of a public institution, not counting so much of such expenditure with respect to any individual for any month as exceeds $30, and (2) 5 per centum of such amount, which shall be used for paying the costs of administering the State plan or for old-age assistance, or both, and for no other purpose: *Provided,* That the State plan, in order to be approved by the Board, need not provide for financial participation before July 1, 1937, by the State, in the case of any State which the Board, upon application by the State and after reasonable notice and opportunity for hearing to the State, finds is prevented by its constitution from providing such financial participation.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Board shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of clause (1) of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such clause, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than one-half of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of aged individuals in the State, and (C) such other investigation as the Board may find necessary.

(2) The Board shall then certify to the Secretary of the Treasury the amount so estimated by the Board, reduced or increased, as the case may be, by any sum by which it finds that its estimate for any prior quarter was greater or less than the amount which should have been paid to the State under clause (1) of subsection (a) for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Board for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Board, the amount so certified, increased by 5 per centum.

OPERATION OF STATE PLANS

SEC. 4. In the case of any State plan for old-age assistance which has been approved by the Board, if the Board, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any age, residence, or citizenship requirement prohibited by section 2 (b), or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 2 (a) to be included in the plan;

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

ADMINISTRATION

SEC. 5. There is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $250,000, for all necessary expenses of the Board in administering the provisions of this title.

DEFINITION

SEC. 6. When used in this title the term "old-age assistance" means money payments to aged individuals.

TITLE II—FEDERAL OLD-AGE BENEFITS

OLD-AGE RESERVE ACCOUNT

SECTION 201. (a) There is hereby created an account in the Treasury of the United States to be known as the "Old-Age Reserve Account" hereinafter in this title called the "Account." There is hereby authorized to be appropriated to the Account for each fiscal year, beginning with the fiscal year ending June 30, 1937, an amount sufficient as an annual premium to provide for the payments

required under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually. The Secretary of the Treasury shall submit annually to the Bureau of the Budget an estimate of the appropriations to be made to the Account.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the amounts credited to the Account as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Account. Such special obligations shall bear interest at the rate of 3 per centum per annum. Obligations other than such special obligations may be acquired for the Account only on such terms as to provide an investment yield of not less than 3 per centum per annum.

(c) Any obligations acquired by the Account (except special obligations issued exclusively to the Account) may be sold at the market price, and

such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Account shall be credited to and form a part of the Account.

(e) All amounts credited to the Account shall be available for making payments required under this title.

(f) The Secretary of the Treasury shall include in his annual report the actuarial status of the Account.

OLD-AGE BENEFIT PAYMENTS

SEC. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive, with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000.

(b) In no case shall the monthly rate computed under subsection (a) exceed $85.

(c) If the Board finds at any time that more or less than the correct amount has theretofore been paid to any individual under this section, then, under regulations made by the Board, proper adjustments shall be made in connection with subsequent payments under this section to the same individual.

(d) Whenever the Board finds that any qualified individual has received wages with respect to regular employment after he attained the age of sixty-five, the old-age benefit payable to such individual shall be reduced, for each calendar month in any part of which such regular employment occurred, by an amount equal to one month's benefit. Such reduction shall be made, under regulations prescribed by the Board, by deductions from one or more payments of old-age benefit to such individual.

PAYMENTS UPON DEATH

SEC. 203. (a) If any individual dies before attaining the age of sixty-five, there shall be paid to his estate an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936.

(b) If the Board finds that the correct amount of the old-age benefit payable to a qualified individual during his life under section 202 was less than 3½ per centum of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which such 3½ per centum exceeds the amount (whether more or less than the correct amount) paid to him during his life as old-age benefit.

(c) If the Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was less than the correct amount to which he was entitled under section 202, and that the correct amount of such old-age benefit was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then there shall be paid to his estate a sum equal to the amount, if any, by which the correct amount of the old-age benefit exceeds the amount which was so paid to him during his life.

PAYMENTS TO AGED INDIVIDUALS NOT QUALIFIED FOR BENEFITS

SEC. 204. (a) There shall be paid in a lump sum to any individual who, upon attaining the age of sixty-five, is not a qualified individual, an amount equal to 3½ per centum of the total wages determined by the Board to have been paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five.

(b) After any individual becomes entitled to any payment under subsection (a), no other payment shall be made under this title in any manner measured by wages paid to him, except that any part

of any payment under subsection (a) which is not paid to him before his death shall be paid to his estate.

AMOUNTS OF $500 OR LESS PAYABLE TO ESTATES

SEC. 205. If any amount payable to an estate under section 203 or 204 is $500 or less, such amount may, under regulations prescribed by the Board, be paid to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of such estate.

OVERPAYMENTS DURING LIFE

SEC. 206. If the Board finds that the total amount paid to a qualified individual under an old-age benefit during his life was more than the correct amount to which he was entitled under section 202, and was 3½ per centum or more of the total wages by which such old-age benefit was measurable, then upon his death there shall be repaid to the United States by his estate the amount, if any, by which such total amount paid to him during his life exceeds whichever of the following is the greater: (1) Such 3½ per centum, or (2) the correct amount to which he was entitled under section 202.

METHOD OF MAKING PAYMENTS

SEC. 207. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each person entitled to receive a payment under this title, the amount of such pay-

ment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursement of the Treasury Department,and prior to audit or settlement by the General Acounting Office, shall make payment in acordance with the certification by the Board.

ASSIGNMENT

SEC. 208. The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

PENALTIES

SEC. 209. Whoever in any application for any payment under this title makes any false statement as to any material fact, knowing such statement to be false, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

DEFINITIONS

SEC. 210. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such

employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(c) The term "qualified individual" means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December

31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year.

TITLE III—GRANTS TO STATES FOR UNEMPLOYMENT COMPENSATION ADMINISTRATION

APPROPRIATION

SECTION 301. For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated, for the fiscal year ending June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, to be used as hereinafter provided.

PAYMENTS TO STATES

SEC. 302. (a) The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under Title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper administration of such law; and (3) such other factors as the Board finds relevant. The Board shall not cer-

tify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

(b) Out of the sums appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a), pay, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, to the State agency charged with the administration of such law the amount so certified.

PROVISIONS OF STATE LAWS

SEC. 303. (a) The Board shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board under Title IX, includes provisions for—

(1) Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices in the State or such other agencies as the Board may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State, immediately upon such receipt, to the Secretary of the Treasury to the credit of the Unemploy-

ment Trust Fund established by section 904; and

(5) Expenditure of all money requisitioned by the State agency from the Unemployment Trust Fund, in the payment of unemployment compensation, exclusive of expenses of administration; and

(6) The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law.

(b) Whenever the Board, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a);

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that there is no longer any such denial or failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

TITLE IV—GRANTS TO STATES FOR AID TO DEPENDENT CHILDREN

APPROPRIATION

SECTION 401. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy dependent children, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $24,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Board, State plans for aid to dependent children.

STATE PLANS FOR AID TO DEPENDENT CHILDREN

SEC. 402. (a) A State plan for aid to dependent children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or

designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim with respect to aid to a dependent child is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports.

(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes as a condition of eligibility for aid to dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within the State within one year immediately preceding the application, if its mother has resided in the State for one year immediately preceding the birth.

PAYMENT TO STATES

SEC. 403. (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid to dependent children, for each quarter, beginning with the quarter commencing July 1, 1935, an amount,

which shall be used exclusively for carrying out the State plan, equal to one-third of the total of the sums expended during such quarter under such plan, not counting so much of such expenditure with respect to any dependent child for any month as exceeds $18, or if there is more than one dependent child in the same home, as exceeds $18 for any month with respect to one such dependent child and $12 for such month with respect to each of the other dependent children.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Board shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than two-thirds of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of dependent children in the State, and (C) such other investigation as the Board may find necessary.

(2) The Board shall then certify to the Secretary of the Treasury the amount so estimated by the Board, reduced or increased, as the case may be, by any sum by which it

finds that its estimate for any prior quarter was greater or less than the amount which should have been paid to the State for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Board for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Board, the amount so certified.

OPERATION OF STATE PLANS

SEC. 404. In the case of any State plan for aid to dependent children which has been approved by the Board, if the Board, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any residence requirement prohibited by section 402 (b), or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 402 (a) to be included in the plan;

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

ADMINISTRATION

SEC. 405. There is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $250,000 for all necessary expenses of the Board in administering the provisions of this title.

DEFINITIONS

SEC. 406. When used in this title—

(a) The term "dependent child" means a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt, in a place of residence maintained by one or more of such relatives as his or their own home;

(b) The term "aid to dependent children" means money payments with respect to a dependent child or dependent children.

TITLE V—GRANTS TO STATES FOR MATERNAL AND CHILD WELFARE

PART 1—MATERNAL AND CHILD HEALTH SERVICES

APPROPRIATION

SECTION 501. For the purpose of enabling each State to extend and improve, as far as practicable under the conditions in such State, services for promoting the health of mothers and children, especially in rural areas and in areas suffering from severe economic distress, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of $3,800,000. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Chief of the Children's Bureau, State plans for such services.

ALLOTMENTS TO STATES

SEC. 502. (a) Out of the sums appropriated pursuant to section 501 for each fiscal year the Secretary of Labor shall allot to each State $20,000, and such part of $1,800,000 as he finds that the number of live births in such State bore to the total number of live births in the United States, in the latest calendar year for which the Bureau of the Census has available statistics.

(b) Out of the sums appropriated pursuant to section 501 for each fiscal year the Secretary of Labor shall allot to the States $980,000 (in addition to the allotments made under subsection (a)), according to the financial need of each State for assistance in carrying out its State plan, as deter-

mined by him after taking into consideration the number of live births in such State.

(c) The amount of any allotment to a State under subsection (a) for any fiscal year remaining unpaid to such State at the end of such fiscal year shall be available for payment to such State under section 504 until the end of the second succeeding fiscal year. No payment to a State under section 504 shall be made out of its allotment for any fiscal year until its allotment for the preceding fiscal year has been exhausted or has ceased to be available.

APPROVAL OF STATE PLANS

SEC. 503. (a) A State plan for maternal and child-health services must (1) provide for financial participation by the State; (2) provide for the administration of the plan by the State health agency or the supervision of the administration of the plan by the State health agency; (3) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are necessary for the efficient operation of the plan; (4) provide that the State health agency will make such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports; (5) provide for the extension and improvement of local maternal and child-health services administered by local child-health units; (6) provide for cooperation with medical, nursing, and welfare groups and organizations; and (7) provide for the development of

demonstration services in needy areas and among groups in special need.

(b) The Chief of the Children's Bureau shall approve any plan which fulfills the conditions specified in subsection (a) and shall thereupon notify the Secretary of Labor and the State health agency of his approval.

PAYMENT TO STATES

SEC. 504. (a) From the sums appropriated therefor and the allotments available under section 502 (a), the Secretary of the Treasury shall pay to each State which has an approved plan for maternal and child-health services, for each quarter, beginning with the quarter commencing July 1, 1935, an amount, which shall be used exclusively for carrying out the State plan, equal to one-half of the total sum expended during such quarter for carrying out such plan.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Secretary of Labor shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than one-half of the total sum of such estimated expenditures,

the source or sources from which the difference is expected to be derived, and (B) such investigation as he may find necessary.

(2) The Secretary of Labor shall then certify the amount so estimated by him to the Secretary of the Treasury, reduced or increased, as the case may be, by any sum by which the Secretary of Labor finds that his estimate for any prior quarter was greater or less than the amount which should have been paid to the State for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Secretary of Labor for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Secretary of Labor, the amount so certified.

(c) The Secretary of Labor shall from time to time certify to the Secretary of the Treasury the amounts to be paid to the States from the allotments available under section 502 (b), and the Secretary of the Treasury shall, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, make payments of such amounts from such allotments at the time or times specified by the Secretary of Labor.

OPERATION OF STATE PLANS

SEC. 505. In the case of any State plan for maternal and child-health services which has been approved by the Chief of the Children's Bureau, if the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds that in the administration of the plan there is a failure to comply substantially with any provision required by section 503 to be included in the plan, he shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State.

PART 2—SERVICES FOR CRIPPLED CHILDREN

APPROPRIATION

SEC. 511. For the purpose of enabling each State to extend and improve (especially in rural areas and in areas suffering from severe economic distress), as far as practicable under the conditions in such State, services for locating crippled children, and for providing medical, surgical, corrective, and other services and care, and facilities for diagnosis, hospitalization, and aftercare, for children who are crippled or who are suffering from conditions which lead to crippling, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of $2,850,000. The sums made available

under this section shall be used for making payments to States which have submitted, and had approved by the Chief of the Children's Bureau, State plans for such services.

ALLOTMENTS TO STATES

SEC. 512. (a) Out of the sums appropriated pursuant to section 511 for each fiscal year the Secretary of Labor shall allot to each State $20,000, and the remainder to the States according to the need of each State as determined by him after taking into consideration the number of crippled children in such State in need of the services referred to in section 511 and the cost of furnishing such services to them.

(b) The amount of any allotment to a State under subsection (a) for any fiscal year remaining unpaid to such State at the end of such fiscal year shall be available for payment to such State under section 514 until the end of the second succeeding fiscal year. No payment to a State under section 514 shall be made out of its allotment for any fiscal year until its allotment for the preceding fiscal year has been exhausted or has ceased to be available.

APPROVAL OF STATE PLANS

SEC. 513. (a) A State plan for services for crippled children must (1) provide for financial participation by the State; (2) provide for the administration of the plan by a State agency or the supervision of the administration of the plan by a State agency; (3) provide such methods of administration (other than those relating to selection,

tenure of office, and compensation of personnel) as are necessary for the efficient operation of the plan; (4) provide that the State agency will make such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports; (5) provide for carrying out the purposes specified in section 511; and (6) provide for cooperation with medical, health, nursing, and welfare groups and organizations and with any agency in such State charged with administering State laws providing for vocational rehabilitation of physically handicapped children.

(b) The Chief of the Children's Bureau shall approve any plan which fulfills the conditions specified in subsection (a) and shall thereupon notify the Secretary of Labor and the State agency of his approval.

PAYMENT TO STATES

SEC. 514. (a) From the sums appropriated therefor and the allotments available under section 512, the Secretary of the Treasury shall pay to each State which has an approved plan for services for crippled children, for each quarter, beginning with the quarter commencing July 1, 1935, an amount, which shall be used exclusively for carrying out the State plan, equal to one-half of the total sum expended during such quarter for carrying out such plan.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Secretary of Labor shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than one-half of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such investigation as he may find necessary.

(2) The Secretary of Labor shall then certify the amount so estimated by him to the Secretary of the Treasury, reduced or increased, as the case may be, by any sum by which the Secretary of Labor finds that his estimate for any prior quarter was greater or less than the amount which should have been paid to the State for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Secretary of Labor for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Secretary of Labor, the amount so certified.

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OPERATION OF STATE PLANS

SEC. 515. In the case of any State plan for services for crippled children which has been approved by the Chief of the Children's Bureau, if the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds that in the administration of the plan there is a failure to comply substantially with any provision required by section 513 to be included in the plan, he shall notify such State agency that further payments will not be made to the State until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State.

PART 3—CHILD-WELFARE SERVICES

SEC. 521. (a) For the purpose of enabling the United States, through the Children's Bureau, to cooperate with State public-welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, public-welfare services (hereinafter in this section referred to as "child-welfare services") for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent, there is hereby authorized to be appropriated for each fiscal year, begininng with the fiscal year ending June 30, 1936, the sum of $1,500,000. Such amount shall be allotted by the Secretary of Labor for use by cooperating State public-welfare agencies on the basis of plans developed jointly by the State agency and the Children's Bureau, to

each State, $10,000, and the remainder to each State on the basis of such plans, not to exceed such part of the remainder as the rural population of such State bears to the total rural population of the United States. The amount so allotted shall be expended for payment of part of the cost of district, county or other local child-welfare services in areas predominantly rural, and for developing State services for the encouragement and assistance of adequate methods of community child-welfare organization in areas predominantly rural and other areas of special need. The amount of any allotment to a State under this section for any fiscal year remaining unpaid to such State at the end of such fiscal year shall be available for payment to such State under this section until the end of the second succeeding fiscal year. No payment to a State under this section shall be made out of its allotment for any fiscal year until its allotment for the preceding fiscal year has been exhausted or has ceased to be available.

(b) From the sums appropriated therefor and the allotments available under subsection (a) the Secretary of Labor shall from time to time certify to the Secretary of the Treasury the amounts to be paid to the States, and the Secretary of the Treasury shall, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, make payments of such amounts from such allotments at the time or times specified by the Secretary of Labor.

PART 4—VOCATIONAL REHABILITATION

SEC. 531. (a) In order to enable the United States to cooperate with the States and Hawaii in extending and strengthening their programs of vocational rehabilitation of the physically disabled, and to continue to carry out the provisions and purposes of the Act entitled "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment", approved June 2, 1920, as amended (U. S. C., title 29, ch. 4; U. S. C., Supp. VII, title 29, secs. 31, 32, 34, 35, 37, 39, and 40), there is hereby authorized to be appropriated for the fiscal years ending June 30, 1936, and June 30, 1937, the sum of $841,000 for each such fiscal year in addition to the amount of the existing authorization, and for each fiscal year thereafter the sum of $1,938,000. Of the sums appropriated pursuant to such authorization for each fiscal year, $5,000 shall be apportioned to the Territory of Hawaii and the remainder shall be apportioned among the several States in the manner provided in such Act of June 2, 1920, as amended.

(b) For the administration of such Act of June 2, 1920, as amended, by the Federal agency authorized to administer it, there is hereby authorized to be appropriated for the fiscal years ending June 30, 1936, and June 30, 1937, the sum of $22,000 for each such fiscal year in addition to the amount of the existing authorization, and for each fiscal year thereafter the sum of $102,000.

PART 5—ADMINISTRATION

SEC. 541. (a) There is hereby authorized to be appropriated for the fiscal year ending June 30,

1936, the sum of $425,000, for all necessary expenses of the Children's Bureau in administering the provisions of this title, except section 531.

(b) The Children's Bureau shall make such studies and investigations as will promote the efficient administration of this title, except section 531.

(c) The Secretary of Labor shall include in his annual report to Congress a full account of the administration of this title, except section 531.

TITLE VI—PUBLIC HEALTH WORK

APPROPRIATION

SECTION 601. For the purpose of assisting States, counties, health districts, and other political subdivisions of the States in establishing and maintaining adequate public-health services, including the training of personnel for State and local health work, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of $8,000,000 to be used as hereinafter provided.

STATE AND LOCAL PUBLIC HEALTH SERVICES

SEC. 602. (a) The Surgeon General of the Public Health Service, with the approval of the Secretary of the Treasury, shall, at the beginning of each fiscal year, allot to the States the total of (1) the amount appropriated for such year pursuant to section 601; and (2) the amounts of the allotments under this section for the preceding fiscal year remaining unpaid to the States at the end of such fiscal year. The amounts of such allotments shall

be determined on the basis of (1) the population; (2) the special health problems; and (3) the financial needs; of the respective States. Upon making such allotments the Surgeon General of the Public Health Service shall certify the amounts thereof to the Secretary of the Treasury.

(b) The amount of an allotment to any State under subsection (a) for any fiscal year, remaining unpaid at the end of such fiscal year, shall be available for allotment to States under subsection (a) for the succeeding fiscal year, in addition to the amount appropriated for such year.

(c) Prior to the beginning of each quarter of the fiscal year, the Surgeon General of the Public Health Service shall, with the approval of the Secretary of the Treasury, determine in accordance with rules and regulations previously prescribed by such Surgeon General after consultation with a conference of the State and Territorial health authorities, the amount to be paid to each State for such quarter from the allotment to such State, and shall certify the amount so determined to the Secretary of the Treasury. Upon receipt of such certification, the Secretary of the Treasury shall, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay in accordance with such certification.

(d) The moneys so paid to any State shall be expended solely in carrying out the purposes specified in section 601, and in accordance with plans presented by the health authority of such State and approved by the Surgeon General of the Public Health Service.

INVESTIGATIONS

SEC. 603. (a) There is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1936, the sum of $2,000,000 for expenditure by the Public Health Service for investigation of disease and problems of sanitation (including the printing and binding of the findings of such investigations), and for the pay and allowances and traveling expenses of personnel of the Public Health Service, including commissioned officers, engaged in such investigations or detailed to cooperate with the health authorities of any State in carrying out the purposes specified in section 601: *Provided,* That no personnel of the Public Health Service shall be detailed to cooperate with the health authorities of any State except at the request of the proper authorities of such State.

(b) The personnel of the Public Health Service paid from any appropriation not made pursuant to subsection (a) may be detailed to assist in carrying out the purposes of this title. The appropriation from which they are paid shall be reimbursed from the appropriation made pursuant to subsection (a) to the extent of their salaries and allowances for services performed while so detailed.

(c) The Secretary of the Treasury shall include in his annual report to Congress a full account of the administration of this title.

TITLE VII—SOCIAL SECURITY BOARD

ESTABLISHMENT

SECTION 701. There is hereby established a Social Security Board (in this Act referred to as the

"Board") to be composed of three members to be appointed by the President, by and with the advice and consent of the Senate. During his term of membership on the Board, no member shall engage in any other business, vocation, or employment. not more than two of the members of the Board shall be members of the same political party. Each member shall receive a salary at the rate of $10,000 a year and shall hold office for a term of six years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term; and (2) the terms of office of the members first taking office after the date of the enactment of this Act shall expire, as designated by the President at the time of appointment, one at the end of two years, one at the end of four years, and one at the end of six years, after the date of the enactment of this Act. The President shall designate one of the members as the chairman of the Board.

DUTIES OF SOCIAL SECURITY BOARD

SEC. 702. The Board shall perform the duties imposed upon it by this Act and shall also have the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance, and as to legislation and matters of administrative policy concerning old-age pensions, unemployment compensation, accident compensation, and related subjects.

EXPENSES OF THE BOARD

SEC. 703. The Board is authorized to appoint and fix the compensation of such officers and employees, and to make such expenditures, as may be necessary for carrying out its functions under this Act. Appointments of attorneys and experts may be made without regard to the civil-service laws.

REPORTS

SEC. 704. The Board shall make a full report to Congress, at the beginning of each regular session, of the administration of the functions with which it is charged.

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

INCOME TAX ON EMPLOYEES

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum.

DEDUCTION OF TAX FROM WAGES

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer.

DEDUCTIBILITY FROM INCOME TAX

SEC. 803. For the purposes of the income tax imposed by Title I of the Revenue Act of 1934 or by any Act of Congress in substitution therefor, the tax imposed by section 801 shall not be allowed as a deduction to the taxpayer in computing his net income for the year in which such tax is deducted from his wages.

EXCISE TAX ON EMPLOYERS

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to hav-

ing individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum.

ADJUSTMENT OF EMPLOYERS' TAX

SEC. 805. If more or less than the correct amount of tax imposed by section 804 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer.

REFUNDS AND DEFICIENCIES

SEC. 806. If more or less than the correct amount of tax imposed by section 801 or 804 is paid or deducted with respect to any wage payment and the overpayment or underpayment of tax cannot

be adjusted under section 802 (b) or 805 the amount of the overpayment shall be refunded and the amount of the underpayment shall be collected, in such manner and at such times (subject to the statutes of limitations properly applicable thereto) as may be prescribed by regulations made under this title.

COLLECTION AND PAYMENT OF TAXES

SEC. 807. (a) The taxes imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. If the tax is not paid when due, there shall be added as part of the tax interest (except in the case of adjustments made in accordance with the provisions of sections 802 (b) and 805) at the rate of one-half of 1 per centum per month from the date the tax became due until paid.

(b) Such taxes shall be collected and paid in such manner, at such times, and under such conditions, not inconsistent with this title (either by making and filing returns, or by stamps, coupons, tickets, books, or other reasonable devices or methods necessary or helpful in securing a complete and proper collection and payment of the tax or in securing proper identification of the taxpayer), as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue

Act of 1934, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable with respect to the taxes imposed by this title.

(d) In the payment of any tax under this title a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

RULES AND REGULATIONS

SEC. 808. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title.

SALE OF STAMPS BY POSTMASTERS

SEC. 809. The Commissioner of Internal Revenue shall furnish to the Postmaster General without prepayment a suitable quantity of stamps, coupons, tickets, books, or other devices prescribed by the Commissioner under section 807 for the collection or payment of any tax imposed by this title, to be distributed to, and kept on sale by, all post offices of the first and second classes, and such post offices of the third and fourth classes as (1) are located in county seats, or (2) are certified by the Secretary of the Treasury to the Postmaster General as necessary to the proper administration of this title. The Postmaster General may require each such postmaster to furnish bond in such increased amount as he may from time to time determine, and each such postmaster shall deposit the receipts from the sale of such stamps, coupons, tickets, books, or other devices, to the credit of,

and render accounts to, the Postmaster General at such times and in such form as the Postmaster General may by regulations prescribe. The Postmaster General shall at least once a month transfer to the Treasury as internal-revenue collections all receipts so deposited together with a statement of the additional expenditures in the District of Columbia and elsewhere incurred by the Post Office Department in performing the duties imposed upon said Department by this Act, and the Secretary of the Treasury is hereby authorized and directed to advance from time to time to the credit of the Post Office Department from appropriations made for the collection of the taxes imposed by this title, such sums as may be required for such additional expenditures incurred by the Post Office Department.

PENALTIES

SEC. 810. (a) Whoever buys, sells, offers for sale, uses, transfers, takes or gives in exchange, or pledges or gives in pledge, except as authorized in this title or in regulations made pursuant thereto, any stamp, coupon, ticket, book, or other device, prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, shall be fined not more than $1,000 or imprisoned for not more than six months, or both.

(b) Whoever, with intent to defraud, alters, forges, makes, or counterfeits any stamp, coupon, ticket, book, or other device prescribed by the Commissioner of Internal Revenue under section 807 for the collection or payment of any tax imposed by this title, or uses, sells, lends, or has in his pos-

session any such altered, forged, or counterfeited stamp, coupon, ticket, book, or other device, or makes, uses, sells, or has in his possession any material in imitation of the material used in the manufacture of such stamp, coupon, ticket, book, or other device, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

DEFINITIONS

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed by an individual who has attained the age of sixty-five;

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

IMPOSITION OF TAX

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

CREDIT AGAINST TAX

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

CERTIFICATION OF STATE LAWS

SEC. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona-fide labor organization.;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

UNEMPLOYMENT TRUST FUND

SEC. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter in this title called the "Fund". The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest,

computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not

exceeding the amount standing to the account of such State agency at the time of such payment.

ADMINISTRATION, REFUNDS, AND PENALTIES

SEC. 905. (a) The tax imposed by this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as internal-revenue collections. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of one-half of 1 per centum per month from the date the tax became due until paid.

(b) Not later than January 31, next following the close of the taxable year, each employer shall make a return of the tax under this title for such taxable year. Each such return shall be made under oath, shall be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer, or, if he has no principal place of business in the United States, then with the collector at Baltimore, Maryland, and shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as not inconsistent with this title, be applicable in respect of the tax imposed by this title. The Commissioner may extend the time for filing the return of the tax imposed by this title, under such rules and regulations as he may prescribe with the approval

of the Secretary of the Treasury, but no such extension shall be for more than sixty days.

(c) Returns filed under this title shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

(d) The taxpayer may elect to pay the tax in four equal installments instead of in a single payment, in which case the first installment shall be paid not later than the last day prescribed for the filing of returns, the second installment shall be paid on or before the last day of the third month, the third installment on or before the last day of the sixth month, and the fourth installment on or before the last day of the ninth month, after such last day. If the tax or any installment thereof is not paid on or before the last day of the period fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

(e) At the request of the taxpayer the time for payment of the tax or any installment thereof may be extended under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, for a period not to exceed six months from the last day of the period prescribed for the payment of the tax or any installment thereof. The amount of the tax in respect of which any extension is granted shall be paid (with interest at the rate of one-half of 1 per centum per month) on or before the date of the expiration of the period of the extension.

(f) In the payment of any tax under this title a fractional part of a cent shall be disregarded un-

less it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

INTERSTATE COMMERCE

SEC. 906. No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

DEFINITIONS

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of a crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of

twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) The term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term "contributions" means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

(g) The term "compensation" means cash benefits payable to individuals with respect to their unemployment.

RULES AND REGULATIONS

SEC. 908. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make and publish rules and regulations for the enforcement of this title, except sections 903, 904, and 910.

ALLOWANCE OF ADDITIONAL CREDIT

SEC. 909. (a) In addition to the credit allowed under section 902, a taxpayer may, subject to the conditions imposed by section 910, credit against the tax imposed by section 901 for any taxable year after the taxable year 1937, an amount, with respect to each State law, equal to the amount, if any, by which the contributions, with respect to employment in such taxable year, actually paid by the taxpayer under such law before the date of filing his return for such taxable year, is exceeded by whichever of the following is the lesser—

(1) The amount of contributions which he would have been required to pay under such law for such taxable year if he had been subject to the highest rate applicable from time to time throughout such year to any employer under such law; or

(2) Two and seven-tenths per centum of the wages payable by him with respect to employment with respect to which contributions for such year were required under such law.

(b) If the amount of the contributions actually so paid by the taxpayer is less than the amount which he should have paid under the State law, the additional credit under subsection (a) shall be reduced proportionately.

(c) The total credits allowed to a taxpayer under this title shall not exceed 90 per centum of the tax against which such credits are taken.

CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE

SEC. 910. (a) A taxpayer shall be allowed the additional credit under section 909, with respect to his contribution rate under a State law being lower, for any taxable year, than that of another employer subject to such law, only if the Board finds that under such law—

(1) Such lower rate, with respect to contributions to a pooled fund, is permitted on the basis of not less than three years of compensation experience;

(2) Such lower rate, with respect to contributions to a guaranteed employment account, is permitted only when his guaranty of employment was fulfilled in the preceding calendar year, and such guaranteed employment account amounts to not less than 7½ per centum of the total wages payable by him, in accordance with such guaranty, with respect to employment in such State in the preceding calendar year;

(3) Such lower rate, with respect to contributions to a separate reserve account, is permitted only when (A) compensation has been payable from such account throughout the preceding calendar year, and (B) such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three preceding calendar years, and (C) such account amounts

to not less than 7½ per centum of the total wages payable by him (plus the total wages payable by any other employers who may be contributing to such account) with respect to employment in such State in the preceding calendar year.

(b) Such additional credit shall be reduced, if any contributions under such law are made by such taxpayer at a lower rate under conditions not fulfilling the requirements of subsection (a), by the amount bearing the same ratio to such additional credit as the amount of contributions made at such lower rate bears to the total of his contributions paid for such year under such law.

(c) As used in this section—

(1) The term "reserve account" means a separate account in an unemployment fund, with respect to an employer or group of employers, from which compensation is payable only with respect to the unemployment of individuals who were in the employ of such employer, or of one of the employers comprising the group.

(2) The term "pooled fund" means an unemployment fund or any part thereof in which all contributions are mingled and undivided, and from which compensation is payable to all eligible individuals, except that to individuals last employed by employers with respect to whom reserve accounts are maintained by the State agency, it is payable only when such accounts are exhausted.

(3) The term "guaranteed employment account" means a separate account, in an unem-

ployment fund, of contributions paid by an employer (or group of employers) who

(A) guarantees in advance thirty hours of wages for each of forty calendar weeks (or more, with one weekly hour deducted for each added week guaranteed) in twelve months, to all the individuals in his employ in one or more distinct establishments, except that any such individual's guaranty may commence after a probationary period (included within twelve or less consecutive calendar weeks), and

(B) gives security or assurance, satisfactory to the State agency, for the fulfillment of such guaranties,

from which account compensation shall be payable with respect to the unemployment of any such individual whose guaranty is not fulfilled or renewed and who is otherwise eligible for compensation under the State law.

(4) The term "year of compensation experience", as applied to an employer, means any calendar year throughout which compensation was payable with respect to any individual in his employ who became unemployed and was eligible for compensation.

TITLE X—GRANTS TO STATES FOR AID TO THE BLIND

APPROPRIATION

SECTION 1001. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy individuals who are blind, there is hereby author-

ized to be appropriated for the fiscal year ending June 30, 1936, the sum of $3,000,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Social Security Board, State plans for aid to the blind.

STATE PLANS FOR AID TO THE BLIND

SEC. 1002. (a) A State plan for aid to the blind must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for aid is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; (6) provide that the State agency will make such reports, in such form and containing such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and (7) provide that no aid will be fur-

nished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 2 of this Act.

(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan—

(1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application; or

(2) Any citizenship requirement which excludes any citizen of the United States.

PAYMENT TO STATES

SEC. 1003. (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid to the blind, for each quarter, beginning with the quarter commencing July 1, 1935, (1) an amount, which shall be used exclusively as aid to the blind, equal to one-half of the total of the sums expended during such quarter as aid to the blind under the State plan with respect to each individual who is blind and is not an inmate of a public institution, not counting so much of such expenditure with respect to any individual for any month as exceeds $30, and (2) 5 per centum of such amount, which shall be used for paying the costs of administering

the State plan or for aid to the blind, or both, and for no other purpose.

(b) The method of computing and paying such amounts shall be as follows:

(1) The Board shall, prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under the provisions of clause (1) of subsection (a), such estimate to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such clause, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than one-half of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of blind individuals in the State, and (C) such other investigation as the Board may find necessary.

(2) The Board shall then certify to the Secretary of the Treasury the amount so estimated by the Board, reduced or increased, as the case may be, by any sum by which it finds that its estimate for any prior quarter was greater or less than the amount which should have been paid to the State under clause (1) of subsection (a) for such quarter, except to the extent that such sum has been applied to make the amount certified for any prior quarter greater or less than the amount estimated by the Board for such prior quarter.

(3) The Secretary of the Treasury shall thereupon, through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, pay to the State, at the time or times fixed by the Board, the amount so certified, increased by 5 per centum.

OPERATION OF STATE PLANS

SEC. 1004. In the case of any State plan for aid to the blind which has been approved by the Board, if the Board, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any residence or citizenship requirement prohibited by section 1002 (b), or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 1002 (a) to be included in the plan;

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

ADMINISTRATION

SEC. 1005. There is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of $30,000, for all necessary expenses of the Board in administering the provisions of this title.

DEFINITION

SEC. 1006. When used in this title the term "aid to the blind" means money payments to blind individuals.

TITLE XI—GENERAL PROVISIONS

DEFINITIONS

SECTION 1101. (a) When used in this Act—

(1) The term "State" (except when used in section 531) includes Alaska, Hawaii, and the District of Columbia.

(2) The term "United States" when used in a geographical sense means the States, Alaska, Hawaii, and the District of Columbia.

(3) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(4) The term "corporation" includes associations, joint-stock companies, and insurance companies.

(5) The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(6) The term "employee" includes an officer of a corporation.

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(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(c) Whenever under this Act or any Act of Congress, or under the law of any State, an employer is required or permitted to deduct any amount from the remuneration of an employee and to pay the amount deducted to the United States, a State, or any political subdivision thereof, then for the purposes of this Act the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.

(d) Nothing in this Act shall be construed as authorizing any Federal official, agent, or representative, in carrying out any of the provisions of this Act, to take charge of any child over the objection of either of the parents of such child, or of the person standing in loco parentis to such child.

RULES AND REGULATIONS

SEC. 1102. The Secretary of the Treasury, the Secretary of Labor, and the Social Security Board, respectively, shall make and publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which each is charged under this Act.

SEPARABILITY

SEC. 1103. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

RESERVATION OF POWER

SEC. 1104. The right to alter, amend, or repeal any provision of this Act is hereby reserved to the Congress.

SHORT TITLE

SEC. 1105. This Act may be cited as the "Social Security Act."

Approved, August 14, 1935.

APPENDIX B

TABLE I.—*Illustrative monthly Federal old-age benefits under Title II*

Average monthly salary	Years of employment								
	5	10	15	20	25	30	35	40	45
$25	(1)	$15.00	$16.25	$17.50	$18.75	$20.00	$21.25	$22.50	$23.75
$50	$15.00	17.50	20.00	22.50	25.00	27.50	30.00	32.50	35.00
$75	16.25	20.00	23.75	27.50	31.25	35.00	38.75	42.50	46.25
$100	17.50	22.50	27.50	32.50	37.50	42.50	47.50	51.25	53.75
$125	18.75	25.00	31.25	37.50	43.75	50.00	53.13	56.25	59.38
$150	20.00	27.50	35.00	42.50	50.00	53.75	57.50	61.25	65.00
$175	21.25	30.00	38.75	47.50	53.13	57.50	61.88	66.25	70.63
$200	22.50	32.50	42.50	51.25	56.25	61.25	66.25	71.25	76.23
$225	23.75	35.00	46.25	53.75	59.38	65.00	70.63	76.25	81.88
$250	25.00	37.50	50.00	56.25	62.50	68.75	75.00	81.25	85.00

[1] Lump sum payment of $52.50.

Source: H. Rep. No. 615, 74th Cong., 1st sess.

TABLE II.—*Number and percent of aged in the population, 1870–1980* [1]

Year	Total population	Persons 65 years of age and over	
		Number	Percent of total
1870	38,558,371	1,153,649	2.99
1880	50,155,783	1,723,459	3.4
1890	62,622,250	2,417,288	3.9
1900	75,994,575	3,080,498	4.0
1910	91,972,266	3,949,524	4.3
1920	105,710,620	4,933,215	4.7
1930	122,775,046	6,633,805	5.4
1936	128,006,000	7,700,000	6.0
1940	131,993,100	8,419,000	6.3
1950	141,644,800	11,213,300	7.9
1960	149,371,600	14,841,700	9.9
1970	154,969,300	18,042,900	11.6
1980	158,335,200	22,189,800	14.0

[1] Source: Data from 1870–1930 from U. S. Census volumes on population. Estimated figures for July 1, 1936, computed by Division of Public Assistance Statistics of Social Security Board and Bureau of Census. Estimates 1940–80 from An Empirical Method of Calculating Future Population, by P. K. Whelpton, Journal of the American Statistical Association, September 1936, vol. 31, no. 195, pp. 457–473.

TABLE III.—*Percentage distribution of the total population by age groups, 1850–1930* [1]

Year	Percentage distribution by specified age groups						
	Total	0–4	5–19	20–29	30–44	45–64	65+
1850	100.0	15.1	37.4	18.5	[2] 16.6	[2] 9.9	[2] 2.6
1860	100.0	15.4	35.8	18.2	[2] 17.4	[2] 10.4	[2] 2.7
1870	100.0	14.3	35.4	17.7	17.7	11.9	[2] 3.0
1880	100.0	13.8	34.3	18.3	17.6	12.6	3.4
1890 [3]	100.0	12.2	33.9	18.3	18.6	13.1	3.9
1900	100.0	12.1	32.3	18.3	19.5	13.7	4.1
1910	100.0	11.6	30.4	18.8	20.3	14.6	4.3
1920	100.0	11.0	29.8	17.4	21.0	16.1	4.7
1930	100.0	9.3	29.5	16.9	21.5	17.5	5.4

[1] Source: Thompson, Warren S., and Whelpton, P. W., Population Trends in the United States, 1933, p. 109.

[2] Number of persons 40 to 44 and 60 to 64 is estimated from those 40 to 49 and 60 to 69.

[3] Excluding 325,464 in Indian territory and on Indian reservations for whom age data are not available.

TABLE IV.—*Future population of the United States according to medium fertility and mortality trends and allowing net immigration of 100,000 annually beginning in 1940* [1]

[Thousands]

Age period	1930 [2]	1940	1950	1960	1970	1980
0 to 4	11,453.4	10,395.1	10,623.4	10,117.2	9,882.1	9,673.1
5 to 9	12,617.4	10,764.3	11,113.1	10,961.4	10,479.7	10,314.2
10 to 14	12,014.0	11,863.0	10,895.2	11,161.2	10,663.1	10,360.3
15 to 19	11,561.0	12,424.8	10,726.8	11,079.5	10,934.1	10,459.3
20 to 24	10,878.8	11,759.9	11,852.2	10,918.8	11,187.1	10,690.5
25 to 29	9,841.2	11,218.5	12,378.8	10,752.5	11,112.8	10,978.1
30 to 34	9,127.3	10,466.1	11,596.0	11,732.8	10,847.4	11,119.5
35 to 39	9,215.8	9,360.0	10,907.6	12,095.7	10,550.4	10,918.3
40 to 44	7,906.3	8,592.0	10,039.7	11,206.0	11,381.2	10,543.7
45 to 49	7,047.7	8,525.3	8,820.4	10,389.8	11,598.1	10,140.3
50 to 54	5,980.3	7,206.2	7,900.3	9,359.2	10,666.4	10,777.3
55 to 59	4,649.2	6,110.9	7,555.0	7,974.3	9,554.1	10,737.2
60 to 64	3,754.0	4,888.0	6,023.0	6,781.5	8,239.5	9,436.6
65 to 69	2,772.5	3,483.3	4,666.4	5,972.6	6,543.2	8,045.4
70 to 74	1,951.5	2,444.6	3,273.9	4,222.2	5,025.3	6,323.3
75 to 79	1,107.3	1,450.3	1,891.0	2,686.2	3,687.7	4,218.0
80 to 84	535.2	722.6	951.6	1,375.6	1,914.9	2,372.6
85 to 89	205.7	245.8	332.8	455.0	683.6	962.7
90 to 94	51.6	61.5	84.3	112.1	164.1	229.9
95 plus	14.9	10.9	13.2	18.0	24.5	37.9
Total	122,775.1	131,993.1	141,644.8	149,371.6	154,969.3	158,335.2

[1] Source: Whelpton, P. K., An Empirical Method of Calculating Future Population, *Journal of the American Statistical Association*, vol. 31, no. 195, pp. 457–473, September 1936, p. 472.

[2] Census.

TABLE V.—*Age at which earnings were impaired and at which they ceased, in a group of workers in Pittsburgh, Reading, and Philadelphia, 1919* [1]

Age group	Age when earnings impaired		Age when earnings stopped	
	Number	Percent	Number	Percent
All ages	658	100.0	490	100.0
Under 30 years	21	3.2	.....	.....
30 to 40 years	32	4.8	15	3.0
40 to 50 years	152	23.2	55	11.2
50 to 55 years	126	19.2	64	13.0
55 to 60 years	112	17.1	70	14.2
60 to 65 years	109	16.6	102	21.0
65 to 70 years	52	7.8	81	16.5
70 to 75 years	41	6.2	74	15.1
75 years and over	13	1.9	29	6.0

[1] Source: Report of the Pennsylvania Commission on Old-Age Pensions, Harrisburg, Pa., 268 pp., 1919, p. 104.

TABLE VI.—*Dependency of aged population of New York, July 1, 1929* [1]

Class	Persons 65 and over		Persons 70 and over	
	Number	Percent	Number	Percent
Estimated total	603,700	100.0	350,400	100.0
Self-dependent:				
Pensioners:				
Public	50,390	8.3	38,478	11.0
Federal, civil, and military retirement	4,654	.....	3,600	.....
Federal military	26,394	.....	18,942	.....
State and local retirement	18,725	.....	15,500	.....
Military homes	617	.....	436	.....
Private	10,937	1.8	10,557	3.0
Industrial	7,826	.....	7,826	.....
Fraternal	502	.....	502	.....
Trade union	2,089	.....	2,059	.....
Compensation	550	.....	170	.....
Self-supporting on current earnings (excluding housewives)	172,000	28.5	60,000	17.0
Self-support on income	30,190	5.0	17,500	5.0

[1] Source: Old-Age Security, Report of the New York State Commission, Legislative Document no. 67, 692 pp., 1930, p. 39.

TABLE VI.—*Dependency of aged population of New York, July 1, 1929*—Continued

Class	Persons 65 and over		Persons 70 and over	
	Number	Percent	Number	Percent
Dependant on friends, relatives, etc.:				
Private homes	5,954	1.0	5,400	1.5
Other persons: (including housewives)	297,799	49.4	194,402	55.6
Dependent on organized charity:				
Public	12,924	2.1	9,095	2.6
New York City:				
Blind	416		258	
Veterans	259		200	
Child welfare	236		184	
Ex-firemen	539		490	
Almshouse	1,835		1,210	
Other areas:				
Towns	2,200		1,500	
Cities	2,600		1,600	
Blind	265		100	
Almshouses and public homes	4,674		3,553	
Private	8,421	1.4	6,740	1.9
New York City	1,963		1,140	
Cities	1,100		700	
Private homes	5,358		4,900	
Confined by government for social reasons	15,104	2.5	8,228	2.4
Mental defectives	14,722		8,040	
Prisons	214		104	
Local jails	168		84	

TABLE VII.—*Number of pensioners, amount of pension, and amounts disbursed therefor in last fiscal year and whole period, prior to 1928, by unions*[1]

	Number present in in receipt of pension	Amount of pension per member	Amount paid in pensions in—	
			Latest fiscal year	Whole period of operation
Total	11,269		$3,260,238	$21,584,842
Bricklayers	[2] 2,954	$7 per week	1,021,358	7,160,205
Bridge and structural iron workers	331	$25 per month	86,300	([3])
Electrical workers	([4])	$40 per month	([4])	([4])
Granite cutters	405	$60 per year [5]	16,335	241,044
Locomotive engineers	[6] 4,467	$25 to $65 per month [7]	998,519	4,632,567
Locomotive firemen and enginemen	230	$30 to $70 per month [8]	([3])	141,407
Printers	2,430	$8 per week	990,272	8,740,939
Printing pressmen	244	$7 per week	60,974	
Quarry workers	[9] 18	$50 [10]	900	6,350
Railroad trainmen	[11] 110	$35 to $70 per month	31,080	78,330
Street railway employees	[9] 80	$800 in lump sum	64,000	384,000

[1] Source: Old Age and Disability Pensions, Senate Document No. 140, 70th Cong., 1st sess., May 1928, p. 155.

[2] Includes 76 persons receiving "disability relief" and 823 widows.

[3] No data.

[4] No payments being made as yet. System adopted in 1927.

[5] $10 per month for 6 months of year.

[6] Includes 1,533 widows.

[7] From this, union dues of about $4 per month are deducted.

[8] Widows receive pensions of $35 per month.

[9] Received the lump sum in 1926.

[10] Flat sum, deducted from death benefit.

[11] Includes 13 widows.

TABLE VIII.—*Benefits paid by national and international trade unions, 1929–34, by type of benefit*[1]

Type of benefit	1929	1930	1931	1932	1933	1934
All types of benefit	$32,242,446	$36,697,980	$39,961,873	$51,448,349	[2] $40,692,113	$28,840,644
Sickness	2,831,937	3,649,703	2,220,975	2,308,040	1,665,266	1,023,314
Death	17,598,287	18,527,095	17,132,023	17,674,384	14,780,206	15,011,044
Unemployment	276,718	3,311,280	9,146,724	19,970,557	13,784,043	4,467,802
Old age	4,883,028	5,910,993	6,090,743	6,148,302	4,678,636	3,912,940
Disability	2,707,188	3,234,067	3,671,380	4,006,891	4,837,730	3,176,014
Miscellaneous	3,945,288	2,064,840	1,700,028	1,340,175	946,231	1,409,530

[1] Source: Handbook of Labor Statistics 1936 Edition, Bull. No. 616, United States Department of Labor, Bureau of Labor Statistics, Washington, D. C., 1936, p. 392.

[2] Not the sum of the items, but as given in the report.

TABLE IX.—*Old-age assistance for month of February 1937 in States reporting to the Social Security Board (data reported by State agencies, corrected to Mar. 25, 1937)*

States with plans approved by the Social Security Board	Old-age assistance for February 1937					
	Number of recipients [1]	Amount of obligation incurred for payments to recipients for the month [2]	Average per recipient	Percentage increase (+) or decrease (−) from last month		Number of recipients per 1,000 estimated population 65 and over [4]
				In number of recipients	In amount of payments to recipients	
Total	1,196,423	$22,440,366	$18.76	[5] +4.4	[5] +4.0	[5] 172
1. Alabama	[7] 10,799	[7] 112,916	10.46	+1.0	+.9	89
2. Arkansas	15,158	136,982	9.04	−1.0	−1.0	163
3. California	68,034	2,147,517	31.56	+3.5	+3.6	154
4. Colorado	27,709	767,106	27.68	+2.3	+2.3	388
5. Connecticut	12,591	295,788	23.49	+3.0	−6.1	111
6. Delaware	2,998	32,097	10.71	−.4	−.2	146
7. District of Columbia	1,772	44,862	25.32	+9.6	+9.6	45
8. Florida	9,017	97,732	10.84	+8.8	+8.8	100
9. Hawaii	594	7,980	13.43	[6]	+17.3	57
10. Idaho	8,115	189,238	23.32	+1.3	+1.4	296
11. Illinois	113,093	1,816,354	16.06	+6.8	+8.9	232
12. Indiana	36,377	541,866	14.90	+2.7	+4.5	134
13. Iowa	31,034	459,871	14.82	+2.5	+3.0	106
14. Kentucky	17,812	178,988	10.05	+15.4	+15.6	100
15. Louisiana	15,120	182,850	12.09	+9.9	+7.8	176
16. Maine	3,830	76,774	20.04	−.3	−.3	46
17. Maryland	12,860	220,337	17.13	+.3	+1.5	120
18. Massachusetts	[8] 52,226	[8] 1,389,360	[8] 26.60	[9]	[9]	[9]
19. Michigan	34,043	568,089	16.69	+1.6	+2.4	121
20. Minnesota	58,338	1,111,796	19.06	+1.8	+2.4	309
21. Mississippi	17,953	72,095	4.02	+1.0	+.6	207
22. Missouri	55,335	632,292	11.43	−1.0	−1.0	184
23. Montana	[10] 8,802	[10] 181,184	[10] 20.58	+1.2	+2.1	298
24. Nebraska	25,570	460,375	18.00	+1.8	+4.0	268
25. New Hampshire	3,266	71,675	21.94	+1.1	+2.7	64
26. New Jersey	22,616	372,264	16.46	+1.8	+2.5	93
27. New Mexico	[11]	[11]	[11]	[11]	[11]	[11]

[1] Source: Bureau of Research and Statistics, Division of Public Assistance Statistics, Social Security Board, vol. II, no. 2, February 1937, table 201.3-2.

[2] The number reported in this column is the number of individuals whose applications for old-age assistance have been approved formally.

[3] Amount of payments to recipients from Federal, State, and local funds, administrative expenses excluded.

[4] Estimated with the advice of the United States Bureau of the Census as of Jan. 1, 1937.

[5] Comparison for 40 States, excludes Massachusetts and New Mexico.

[6] For 40 States, excludes Massachusetts and New Mexico.

[7] Of this number, there were 2,035 Confederate pensioners receiving $46,080, an average payment of $22.64. The average payment for the remainder of the case load was $7.63.

[8] No change.

[9] Preliminary figures.

[10] Preliminary figures subject to revision.

[11] No payments for old-age assistance for this month.

TABLE IX.—*Old-age assistance for month of February 1937 in States reporting to the Social Security Board (data reported by State agencies, corrected to Mar. 25, 1937*—Continued

States with plans approved by the Social Security Board	Old-age assistance for February 1937					
	Number of recipients [1]	Amount of obligations incurred for payments to recipients for the month [1]	Average per recipient	Percentage increase (*K*) or decrease (*N*) from last month		Number of recipients per 1,000 estimated population 65 and over [1]
				In number of recipients	In amount of payments to recipients	
28. New York	82,610	1,769,414	21.42	+8.2	+8.4	107
29. North Dakota	6,634	106,058	15.99	+2.7	+3.3	188
30. Ohio	[10] 101,233	[10] 2,405,894	[10] 23.76	+1.5	−.8	215
31. Oklahoma	50,770	736,453	14.50	+8.1	+10.2	441
32. Oregon	12,139	258,633	21.30	+.4	+1.2	150
33. Pennsylvania	70,917	1,541,310	21.73	+4.7	+4.7	118
34. Rhode Island	3,671	64,178	17.48	+6.9	+7.7	83
35. South Dakota	13,039	242,533	18.60	−.2	−9.8	316
36. Texas	103,195	1,514,489	14.68	+10.8	+8.6	378
37. Utah	5,691	128,712	22.62	+4.8	+4.9	220
38. Vermont	3,874	44,540	11.50	−.9	+.1	104
39. Washington	29,619	605,931	20.46	+3.0	+3.1	253
40. West Virginia	[11] 10,316	[11] 131,012	[11] 12.70	+47.4	+48.3	118
41. Wisconsin	35,004	667,633	19.07	+1.4	+2.2	164
42. Wyoming	2,651	55,388	20.89	+1.6	+2.2	261

[10] Preliminary figures subject to revision.

[11] Preliminary figures to be revised to include retroactive grants.

TABLE X—*Operation under State and Federal laws providing for old-age assistance during 1936*

State	Source of funds—(F), Federal; (S), State; (C), County; (T), Territorial; (D), District	Estimated population 65 years and over January 1, 1937 [1]	Number of aged persons estimated to be in need of assistance during 1937	Number of recipients of old-age assistance for December 1936	Estimated amount paid to recipients for 1936 [2]	Monthly payments	
						Maximum amount payable per month	Average payment per recipient for December 1936
United States		7,816,000	1,691,400	1,111,054	$161,919,996		$18.76
Alabama	(F), (S), (C)	121,000	12,000	10,733	929,831	$30	10.72
Arizona	(S), (C)	17,000	3,000	2,000	160,000	30	25.00
Arkansas	(F), (S)	93,000	19,000	14,857	849,069	30	9.01
California	(F), (S), (C)	441,000	68,000	63,172	17,271,860	35	31.36
Colorado	(F), (S)	72,000	29,000	26,586	6,171,009	30	27.65
Connecticut	(F), (S)	114,000	23,000	11,632	1,974,875	28	26.27
Delaware	(F), (S)	21,000	4,000	3,057	295,637	25	10.63
District of Columbia	(F), (D)	40,000	2,000	1,386	145,812	None	25.21
Florida	(F), (S), (C)	90,000	18,000	7,245	738,360	30	10.90
Georgia	(3)	134,000	27,000	(3)	(3)	(3)	(3)
Idaho	(F), (S), (C)	27,000	8,000	7,924	1,679,713	30	23.30
Illinois	(F), (S)	487,000	122,000	93,452	5,793,886	30	15.38
Indiana	(F), (S), (C)	281,000	56,000	34,740	4,021,209	30	14.30
Iowa	(F), (S)	213,000	43,000	29,704	5,016,025	25	14.69
Kansas	(3)	145,000	29,000	(3)	(3)	(3)	(3)
Kentucky	(F), (S)	177,000	35,000	11,522	454,232	15	9.98

[1] Estimated with the advice of the U. S. Bureau of the Census.
[2] Amount of payments to recipients, from Federal, State, and local funds, administrative expenses excluded.
[3] No State law for old-age assistance during 1936.

TABLE X.—*Operation under State and Federal laws providing for old-age assistance during 1936*—Continued

State	Source of funds—(F), Federal; (S), State; (C), County; (T), Territorial; (D), District	Estimated population 65 years and over January 1, 1937 [1]	Number of aged persons estimated to be in need of assistance during 1937	Number of recipients of old-age assistance for December 1936	Estimated amount paid to recipients for 1936 [2]	Monthly payments	
						Maximum amount payable per month	Average payment per recipient for December 1936
Louisiana	(F), (S), (C)	86,000	17,000	12,891	867,263	None	12.70
Maine	(F), (S)	83,000	4,000	3,934	381,183	30	20.05
Maryland	(F), (S), (C)	107,000	21,000	12,482	1,768,638	30	16.46
Massachusetts	(F), (S), Town	320,000	64,000	47,979	9,751,500	None	26.25
Michigan	(F), (S)	281,000	56,000	32,705	5,227,731	30	16.47
Minnesota	(F), (S), (C)	189,000	60,000	56,696	7,504,637	30	18.85
Mississippi	(F), (S)	87,000	19,000	17,892	931,787	15	3.92
Missouri	(F), (S)	302,000	60,000	56,276	4,027,258	30	11.43
Montana	(F), (S), (C)	30,000	9,000	8,243	1,246,752	None	20.41
Nebraska	(F), (S)	96,000	26,000	24,456	3,050,914	30	17.31
Nevada	(C)	6,000	1,000	1,000	144,000	30	12.00
New Hampshire	(F), (S), (C)	51,000	4,000	3,176	672,116	30	21.51
New Jersey	(F), (S), (C)	243,000	49,000	21,681	3,516,368	30	16.21
New Mexico	(F), (S)	19,000	4,000	2,841	228,226	30	16.73
New York	(F), (S), Local	771,000	154,000	72,320	15,595,000	None	21.41
North Carolina	(3)	143,000	29,000	(4)	(4)	(4)	(4)
North Dakota	(F), (S), (C)	35,000	7,000	6,307	721,456	30	15.84
Ohio	(F), (S)	470,000	103,000	99,465	20,878,259	30	24.51
Oklahoma	(F), (S)	115,000	52,000	44,023	2,726,579	30	13.70
Oregon	(F), (S), (C)	81,000	16,000	11,982	2,573,810	30	21.11
Pennsylvania	(F), (S)	603,000	121,000	62,036	13,454,150	30	21.70
Rhode Island	(F), (S)	44,000	4,000	3,242	400,993	30	17.33
South Carolina	(3)	69,000	14,000	(4)	(4)	(4)	(4)

South Dakota	(F), (S)	41,000	12,000	10,067	409,776	30	21.21
Tennessee	(3)	147,000	29,000	(2)	(2)	(2)	(2)
Texas	(F), (S)	275,000	105,000	101,319	7,694,171	30	15.16
Utah	(F), (S), (C)	26,000	6,000	5,294	906,056	30	22.53
Vermont	(F), (S)	37,000	4,000	3,967	547,041	30	11.34
Virginia	(3)	146,000	29,000	(2)	(2)	(2)	(2)
Washington	(F), (S), (C)	117,000	30,000	28,142	4,683,950	30	20.43
West Virginia	(F), (S)	87,000	17,000	4,786	72,221	30	12.44
Wisconsin	(F), (S), (C)	213,000	43,000	34,087	5,735,668	30	18.84
Wyoming	(F), (S), (C)	10,000	3,000	2,560	479,272	30	20.87
Alaska	(T)	3,000	700	600	144,000	.....	20.00
Hawaii	(F), (T), (C)	10,000	700	595	77,703	30	11.45

[2] No State law for old-age assistance during 1936.
Source: Social Security Board (4–23–37).

TABLE XI.—*Amount of obligations incurred for emergency relief by sources of funds, by States,*[1] *January 1933 through December 1935*

State	Obligations incurred for emergency relief[2]						
	Total	Federal funds		State funds		Local funds	
		Amount	Percent	Amount	Percent	Amount	Percent
Alabama	$47,318,378	$44,762,571	94.6	$312,212	0.7	$2,243,593	4.7
Arizona	19,214,371	16,170,501	84.2	2,660,321	13.8	383,549	2.0
Arkansas	41,524,168	40,001,661	96.3	306,136	.8	1,217,368	2.9
California	235,096,613	158,041,750	67.2	38,209,480	16.3	38,845,383	16.5
Colorado	46,509,880	39,269,117	84.4	2,100,257	4.5	5,140,506	11.1
Connecticut	53,526,634	23,514,388	43.9	5,300,394	9.9	24,711,852	46.2
Delaware	5,194,435	2,103,468	40.5	2,107,942	40.6	983,025	18.9
District of Columbia	20,012,872	14,665,529	73.3	0	0	5,347,343	26.7
Florida	42,376,989	40,361,552	95.3	15,492	(3)	1,999,945	4.7
Georgia	47,730,325	44,793,264	93.8	5	(3)	2,937,056	6.2
Idaho	15,883,655	13,359,321	84.1	806,612	5.1	1,717,722	10.8
Illinois	308,672,762	232,791,591	75.4	62,119,849	20.1	13,761,322	4.5
Indiana	80,303,842	51,782,792	64.5	164,635	.2	28,356,415	35.3
Iowa	41,764,128	24,126,482	57.8	4,169,752	10.0	13,467,894	32.2
Kansas	54,747,935	39,949,245	73.0	470,877	.9	14,327,813	26.1
Kentucky	45,078,692	38,819,639	86.1	2,573,998	5.7	3,685,055	8.2
Louisiana	53,126,959	51,496,793	96.9	1,697	(3)	1,629,469	3.1
Maine	23,299,386	11,787,577	50.6	2,087,142	9.0	9,424,667	40.4
Maryland	45,916,020	33,349,321	72.6	10,127,288	22.1	2,439,411	5.3
Massachusetts	218,996,550	114,510,390	52.3	560,381	.3	103,925,779	47.4
Michigan	173,020,332	127,137,454	73.5	26,466,306	15.3	19,416,572	11.2
Minnesota	88,657,414	67,695,056	76.3	5,545,818	6.3	15,416,540	17.4
Mississippi	32,179,719	30,948,147	96.2	208,334	.6	1,023,238	3.2
Missouri	82,747,423	64,083,417	77.4	9,008,186	10.9	9,655,820	11.7
Montana	25,334,633	22,439,392	88.6	451,219	1.8	2,444,022	9.6
Nebraska	28,091,784	21,583,107	76.8	2,748	(3)	6,505,929	23.2
Nevada	5,724,742	5,074,574	88.6	130,489	2.3	519,679	9.1
New Hampshire	12,299,611	5,493,617	44.7	3,664,359	29.8	3,141,635	25.5
New Jersey	138,413,433	94,725,915	68.4	32,832,757	23.7	10,854,761	7.9
New Mexico	15,269,713	14,738,853	96.5	351,293	2.3	179,567	1.2
New York	726,684,294	385,601,208	53.1	125,445,319	17.2	215,637,767	29.7
North Carolina	39,657,112	38,402,296	96.8	0	0	1,254,816	3.2
North Dakota	28,802,104	24,856,991	86.3	41,938	.1	3,903,175	13.6
Ohio	219,473,200	170,540,527	77.8	33,017,460	15.0	15,915,213	7.2
Oklahoma	51,874,144	44,864,484	86.5	364,785	.7	6,644,875	12.8
Oregon	27,717,907	22,018,553	79.4	2,582,754	9.3	3,116,600	11.3
Pennsylvania	446,355,327	316,686,933	70.9	104,695,574	23.5	24,972,820	5.6
Rhode Island	20,190,295	7,940,253	39.3	5,299,281	26.3	6,950,761	34.4
South Carolina	36,613,734	35,866,576	98.0	1,324	(3)	745,834	2.0

[1] Source: Monthly Report of the Federal Emergency Relief Administration, July 1 through June 30, 1936. Washington. D. C., 1937, p. 57.

[2] Includes obligations incurred for relief extended under the general relief program, under all special programs, and for administration; beginning April 1934 these figures also include purchases of materials, supplies, and equipment, rental of equipment (such as team and truck hires), earnings of nonrelief persons employed, and other expenses incident to the Emergency Work Relief Program.

[3] Less than 1/10 of 1 percent

TABLE XI.—*Amount of obligations incurred for emergency relief by sources of funds, by States, January 1933 through December 1935*—Continued

State	Obligations incurred for emergency relief						
	Total	Federal funds		State funds		Local funds	
		Amount	Percent	Amount	Percent	Amount	Percent
South Dakota	35,967,208	32,234,557	89.6	0	0	3,722,651	10.4
Tennessee	36,897,618	34,449,851	93.4	893,324	2.4	1,554,443	4.2
Texas	97,152,410	76,693,808	78.0	19,412,654	20.0	1,045,948	1.1
Utah	25,041,740	19,754,620	78.9	3,370,051	13.5	1,917,069	7.6
Vermont	6,013,946	3,406,100	56.6	39,845	.7	2,568,001	42.7
Virginia	26,361,447	23,779,324	90.2	34,452	.1	2,547,671	9.7
Washington	48,890,429	39,965,184	81.7	5,919,720	12.1	3,005,525	6.2
West Virginia	57,232,504	50,655,633	88.5	5,016,987	8.8	1,559,884	2.7
Wisconsin	109,901,020	79,669,888	72.5	4,234,316	3.8	25,996,816	23.7
Wyoming	7,734,461	7,044,855	91.2	267,039	3.5	412,567	5.3
Total, continental United States	4,096,574,293	2,904,007,125	70.9	523,391,802	12.8	669,175,366	16.3

TABLE XII.—*Means of support of persons 65 years of age and over in the United States, compiled and estimated, 1937* [1]

Means of support	Number	
	Subtotal	Grand total
Total estimated number of persons 65 and over in the United States, Jan. 1, 1937		[2] 7,816,000
A. Self-dependent [3]		[3] 2,708,824
1. In receipt of current earnings	[4] 1,000,000	
2. Possessing savings or real estate	[5] 1,170,000	
3. Federal pensions:		
Military service	[6] 45,728	
Civil service	[7] 44,708	

[1] Economic Insecurity in Old Age (Social Security Board, 1937) p. 4, table 1. Compiled from latest data available from indicated sources.

[2] Estimated on the advice of the Bureau of the Census by the Division of Public Assistance Statistics, Bureau of Research and Statistics, Social Security Board.

[3] Many persons in this group are partially dependent even though they have some income from earnings, property, savings, or investments. Perhaps only one-fourth are completely self-dependent. There is no way to obtain exact information on this point.

[4] Estimate by William Green, Economic Security Act, hearings before the Committee on Ways and Means, House of Representatives, 74th Congress, 1st session, on S. 1130, Washington, D. C., 1935, pp. 168, 1114.

[5] This estimate of 15 percent may be too high.

[6] Estimate by the U. S. Veterans' Administration of number of military pensioners 65 and over. The total number of veterans receiving compensation or disability pensions is 594,831 at this time.

[7] "Operations of Federal Civil-Service Retirement and Disability Fund, 1934", U. S. Department of Labor, Bureau of Labor Statistics, Bull. No. 616, 1936, p. 609.

TABLE XII.—*Means of support of persons 65 years of age and over in the United States, compiled and estimated, 1937*—Continued

Means of support	Number	
	Subtotal	Grand Total
4. State pensions:		
State employees	[9] 1,458	
Teachers	[9] 32,000	
5. Municipalities:		
Teachers	[9] 12,000	
Police and firemen	[9] 20,327	
Other municipal employees	[9] 4,619	
6. Private industrial pensions	[10] 140,000	
7. Group annuities	[11] 6,559	
8. Trade union pensions	[12] 10,000	
9. Other private pensions	[13] 16,000	
10. Insurance annuities	[14] 205,425	
B. Dependent		5,107,176
1. In receipt of public or private assistance	1,547,942	
In receipt of public assistance under the Social Security Act (Feb. 1937)	[15] 1,107,000	
In receipt of emergency unemployment or poor relief in their homes (non-institutional care)	[16] 200,000	
In receipt of earnings from Works Progress Administration June 1936	[17] 51,942	
In receipt of private charity	[16] 10,000	
In almshouses	[18] 50,000	

[9] Recent data not available. Incomplete figures for a few cities, reported in "Care of Aged Persons in the United States", U. S. Department of Labor, Bureau of Labor Statistics, Bull. No. 489, 1929, p. 3.

[9] Current Data from National Education Association, Washington, D. C. There are about 871,000 public school teachers in the United States, 64 percent of whom are covered by some sort of retirement system. The average allowance is about $700 per year. There are 23 State-wide systems and 59 local systems in operation. Four States have passed laws to become operative by or in 1939.

[10] Latimer, M. W., "Industrial Pension Systems in the United States and Canada", published by Industrial Relations Counselors, New York, 2 vols., 1195 pp., 1932, p. 996. (Data for 1931.)

[11] "Industrial Pension Systems in the United States and Canada", Industrial Relations Counselors, New York, 1936, p. 19.

[12] Latimer, M. W., "Trade Union Pension Systems", Industrial Relations Counselors, New York, 1930, pp. 136-143. (Data for 1929.)

[13] Including Carnegie teachers retirement fund, ministers retirement, fraternal organizations, etc. Data incomplete.

[14] *The Spectator*, April 15, 1937, p. 8.

[15] Social Security Board, Bureau of Research and Statistics, Division of Public Assistance Statistics, Vol. II, no. 2, Feb. 1937, table 201.3-2.

[16] Estimated.

[17] First Deficiency Appropriation Bill for 1937, Extract from Hearing before the Subcommittee of the Committee on Appropriations, House of Representatives, in Charge of Deficiency Appropriations, 75th Congress, 1st session, 1937, p. 153.

[18] "Paupers in Almshouses", U. S. Dept. of Commerce, Bureau of the Census, 1923. Increase in number of residents estimated.

TABLE XII.—*Means of support of persons 65 years of age and over in the United States, compiled and estimated, 1937*—Continued

Means of support	Number	
	Subtotal	Grand total
In public homes (Federal or State veterans' homes or homes for civilians)	[19] 17,000	
In hospitals for mental disease	[20] 60,000	
In prisons and jails	[21]	
In private homes for the aged	[19] 52,000	
2. Dependent on friends and relatives (wholly)	[22] 3,559,234	

[19] "Care of Aged Persons in the United States", U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 489, p. 15.

[20] "Statistical Abstract of the United States", 1934, p. 74.

[21] Very small number.

[22] This figure is derived by computation: total number of aged persons minus (A+B 1). Here will be included a small number of transients and homeless. This figure also reflects errors in preceding estimates, but is probably fairly accurate.

TABLE XIII.—*Median duration of unemployment since last usual occupation (in months) of gainful workers 16–64 years of age, by socio-economic class of usual occupation, by sex and race, and by age*

[Urban relief sample, May 1934]

Socio-economic class sex and race	Age groups (in years)						
	16 and over	16–19	20–24	25–34	35–44	45–54	55–64
All	23.0	8.5	16.4	21.5	25.4	28.1	30.3
Skilled	26.2	8.7	16.7	22.1	26.5	29.4	31.7
Semiskilled	21.5	8.3	16.3	20.9	25.0	27.5	29.3
Unskilled	22.2	8.2	15.0	20.5	24.7	27.9	30.4
Clerical	23.1	9.6	19.4	25.8	28.0	28.3	29.6
Proprietors	22.1	8.5	12.0	16.2	21.4	25.2	27.1
Professional	22.6	(1)	11.3	21.7	25.3	25.1	31.0
Male	24.2	9.3	16.9	21.1	25.9	28.9	31.0
Skilled	26.1	8.6	16.7	22.0	26.5	29.3	31.6
Semiskilled	22.3	9.0	16.7	20.0	25.1	28.4	30.7
Unskilled	25.2	9.0	16.6	21.8	27.2	30.0	31.8
Clerical	21.0	10.5	18.9	20.6	23.1	26.0	28.6
Proprietors	22.2	8.7	11.7	16.2	21.5	25.2	27.1
Professional	22.6	(1)	11.3	21.7	25.3	25.1	31.0
Female	19.4	7.6	15.5	22.6	23.4	23.3	24.6
Skilled	30.6	(1)	(1)	32.9	28.4	40.6	(1)
Semiskilled	19.7	7.6	15.4	23.3	24.6	23.7	23.7
Unskilled	16.6	7.5	12.4	18.5	19.4	20.7	23.0

[1] Less than 50 workers.

TABLE XIII.—*Median duration of unemployment since last usual occupation (in months) of gainful workers 16–64 years of age, by socio-economic class of usual occupation, by sex and race, and by age*—Continued

[Urban relief sample, May 1934]

Socio-economic class, sex and race	Age groups (in years)						
	16 and over	16–19	20–24	25–34	35–44	45–54	55–64
Female—Continued.							
Clerical	27.9	7.8	19.9	35.5	41.9	37.7	34.6
Proprietors	21.5	(1)	(1)	(1)	19.7	23.5	(1)
Professional [1]							
White	23.9	8.3	17.0	22.4	28.3	28.9	30.9
Skilled	26.3	8.9	17.0	22.3	26.5	29.6	31.7
Semiskilled	21.9	8.2	16.4	21.3	25.3	27.8	29.8
Unskilled	24.3	7.7	15.9	22.2	27.3	30.0	31.9
Clerical	23.3	9.5	19.5	26.0	28.1	28.4	29.8
Proprietors	22.2	8.7	11.3	16.1	21.2	25.2	27.2
Professional	23.3	(1)	11.3	22.1	25.9	26.0	31.5
Negro	20.2	9.1	14.5	19.4	22.7	24.7	27.2
Skilled	24.7	(1)	12.2	20.2	26.7	27.5	30.8
Semiskilled	19.6	9.2	15.9	19.3	23.2	25.0	24.9
Unskilled	19.9	9.1	14.0	19.3	21.9	24.3	27.1
Clerical	19.8	10.1	16.3	21.9	27.5	27.6	(1)
Proprietors	21.2	(1)	(1)	17.0	23.8	24.2	25.8
Professional	16.1	(1)	(1)	(1)	(1)	(1)	(1)

[1] Data for female professional workers were not tabulated.

TABLE XIV.—*Estimates of payments to beneficiaries under Title II*

[In thousands of dollars]

Calendar year	At death before retirement	At death after retirement	Lump-sum settlements	To annuitants
1937	$3,700		$2,300	
1942	36,200	$700	9,800	$35,000
1947	80,800	5,100	2,300	257,800
1952	131,200	11,000	100	548,400
1957	185,500	18,300	100	913,800
1962	245,000	27,600	100	1,379,600
1967	297,500	34,700	100	1,733,100
1972	346,600	43,600	100	2,180,400
1977	400,300	54,600	100	2,729,400

TABLE XV.—*Estimates of coverage and beneficiaries under Title II*

[In thousands of persons]

Calendar year	Number covered	Number dying before retirement	Number lump-sum settlements	Number annuitants
1937	25,337	191.3	123	.....
1942	26,578	208.8	85	175
1947	27,821	233.8	35	1,121
1952	29,063	259.9	3	2,085
1957	30,305	286.9	3	3,016
1962	31,547	314.1	3	3,843
1967	32,789	339.7	3	4,410
1972	34,031	365.9	3	4,933
1977	34,776	388.9	3	5,525

APPENDIX C

United States Circuit Court of Appeals for the First Circuit

No. 3213—October Term, 1936

George P. Davis, plaintiff, appellant

v.

Boston & Maine Railroad et al., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

Before Bingham, Wilson and Morton, J.J.

OPINION OF THE COURT

April 14, 1937

Wilson, J. This is an appeal from a decree of the District Court of Massachusetts denying an injunction against the defendants and dismissing the plaintiff's bill.

The original bill attacked the constitutionality of both Chap. 531, 49 Stat. 620, known as the Social Security Act, and Chap. 151A of the Massachusetts General Laws (see Chap. 479 of the Acts and

Resolves of 1935); but after intervention by the Commissioner and Collector of Internal Revenue and the filing of answers and a motion to strike by the intervening defendants, it was stipulated by all the parties that: "the only issue involved in the case, either directly or indirectly, is whether Title IX of Chap. 531, 49 Stat. 620, approved Aug. 14, 1935, is an Act of Congress within its powers under the Constitution of the United States, or in violation of the Fifth Amendment thereof; and the only way in which that issue is raised is with respect to the payments under that Title IX."

A stockholder in a corporation directly affected may properly invoke the jurisdiction of the Federal Courts to determine the constitutionality of the Act. *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *United States* v. *Butler*, 297 U. S. 1.

The Social Security Act contains eleven titles, each having separate objects in view, viz: I. Old Age Assistance; II. Old Age Benefits; III. Unemployment Compensation; IV. Aid to Dependent Children; V. Maternal and Child Welfare; VI. Public Health Work; VII. The Creation of a Social Security Board; VIII. Taxes with respect to Employment; IX. Taxes for Benefit of Unemployment; X. Grants to State in Aid of the Blind; XI. General Provisions relating to Definitions, Rules and Separability of the Provisions of the Act. On its face the entire Act was passed to provide financial aid for the unfortunate, the dependent, and those incapacitated by age, or who for any reason are, temporarily, at least, unable to obtain gainful employment.

Title IX imposes a tax on employers of eight or more, except an employer of agricultural labor, domestic servants, or where the service is performed as an officer or member of a vessel on the navigable waters of the United States; or performed by an individual in the employ of son, daughter, or spouse; or by a child under 21 years of age in the employ of his father or mother; or performed in the employ of the United States, or of an instrumentality of the United States; or performed in the employ of a state or a political subdivision thereof, or of one or more states; or services performed in behalf of any charitable organization, or any corporation, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Apart from these exceptions, the salient features of Title IX are contained in the following provisions found in the footnote.[1]

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[1] SEC. 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year.

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total

The appellant assigned as error that the District Court erred in holding that Title IX is a valid Act

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credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

SEC. 903. (a) The Social Security Board shall approve any State laws submitted to it, within thirty days of submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal

of Congress within its powers under the Constitution of the United States.

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such law at any time. The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the

Counsel for the appellant contends as grounds for holding that Title IX is unauthorized under the powers granted to Congress in the Federal Constitution the following: (1) that it is capricious and arbitrary in its exemptions; (2) that it is not uniform in its application; (3) that the tax imposed on employers is not what it is stated to be in the Act, namely, an excise tax, and is not imposed to provide for the general welfare of the United

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average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

States; (4) that in purpose and effect it is an attempt by Congress to enter into a domain hitherto considered as reserved to the states, and to coerce the states into doing something the federal government has no power to do, viz: to provide compensation for those prevented by any circumstances resulting in unemployment from earning a livelihood; and (5) that it seeks further to regulate indirectly the relations between employee and employer.

We pass over the question of capriciousness and lack of uniformity as not being essential for the determination of the case, although a three judge court in the middle district of Alabama, in *Southern Coal & Coke Co.* v. *Attorney General,* has recently held the Alabama statute void on this ground. The important issues, we think, are whether the tax imposed in Sec. 901 of Title IX can be termed an excise tax; and whether the federal government by Sec. 903 of Title IX seeks indirectly to control state action in matters resting solely within the powers reserved to the states under Amendment X of the Constitution.

It is not a question of what powers Congress ought to have to meet certain conditions, but what powers are vested in Congress under the Constitution. In determining what they are, we must rereturn to first principles. The care of the unfortunate and the dependent, and the relief of those unable to labor is a burden imposed on the states and until recently has always been so considered. Congress has no power, either directly or indirectly, to invade this province of the states. *Carter* v. *Carter Coal Co., supra,* p. 295; *Schechter Corp.* v. *United States,* 295 U. S. 495, 549.

It is sometimes suggested that, since the states are powerless to solve the problem presented by unemployment in an emergency such as was passed through in the last four years, therefore there must be power in the federal government to meet the situation. A similar suggestion was made in the case of *Kansas* v. *Colorado,* 206 U. S. 46, at page 89:

> All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States.
>
> But, the court said, the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.

Again, the Supreme Court very aptly said in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 151:

> Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts, and excises", such a tax for more than one hundred years of national existence has as yet

> remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 557; *Thomas* v. *United States*, 192 U. S. 363, 370.

Again in the case of *Carter* v. *Carter Coal Co.*, *supra*, p. 291, the court said:

> The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.

And again on page 292:

> In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and "moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to

> legislate substantively for the general welfare, *United States* v. *Butler, supra,* p. 64; and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted.

It is well settled that taxation by Congress is limited to those forms of taxes described in Sec. 8 of Article I of the Constitution, and with respect to these the only limitations are, that a direct tax shall be apportioned between the states and that duties, imposts and excises shall be uniform and be levied only for the purposes named therein.

Is the tax imposed on employers under Sec. 901 of Title IX an excise tax within the meaning of Sec. 8 of Art. I of the federal Constitution? If it is not, it is not a tax that Congress is authorized to levy. No other provisions of the Constitution than Sec. 8 of Art. I give any powers to Congress to levy taxes and the kind of taxes it might levy are expressly defined therein as: direct taxes, duties, imposts, and excise taxes, and these can only be levied to pay the debts and provide for the common defense and general welfare of the United States.

At the time of the adoption of the Constitution the term "excise tax" was used only in connection with a tax on goods, merchandise and commodities.

Blackstone in his Commentaries, 1 Blackstone, p. 308, in speaking of the different forms of taxation, said:

> Directly opposite in its nature to this (direct tax) is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.

Adams Smith in 1776 in his "The Wealth of Nations", said:

> The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the more general use. * * * They fall almost altogether upon what I call luxuries.

The tax imposed by the British Act of 1777 and cited by the government in support of its contention, was clearly a luxury tax on male servants. It did not apply to any servant employed for the purpose of husbandry or manufacture, or of any trade or calling by which the employer of such servant earned a profit.

Hamilton in the Federalist, No. 21, speaking of excises describes them as "Taxes on articles of consumption."

Gallatin speaks of an excise tax as an excise on "consumable commodities."

As defined in Bouvier's Law Dictionary, commodity is a broader term than merchandise and "may mean almost any description of articles called movable or personal estate. Labor is not a commodity. 23 L. R. A. 1285."

In the discussions in the several state conventions, both as to the adoption of the federal Constitution and with reference to the adoption of the respective state constitutions, it seems apparent that the understanding of the term "excise tax" was a tax laid upon articles of use or consumption, not according to their value, but an arbitrary amount fixed by the legislature; and the term "commodity" appears to have been used in its ordinary sense as including goods, wares, merchandise, produce of the land and manufacture.

Massachusetts in framing its constitution in 1780, in addition to the ordinary direct taxes, authorized the legislature to impose "reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever."

Notwithstanding the definition of the word "commodities" found in the dictionaries, the Supreme Court of Massachusetts gave to the word a broader meaning than the lexicographers in the case of *Portland Bank* v. *Apthorp*, 12 Mass. 252, 256:

> This last word [commodities] will perhaps embrace every thing, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, etc.
>
> It must have been under this general term commodity, which signifies convenience, privilege, profit and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right which has been uniformly and without complaint exercised for thirty years, of exacting a sum of money from attorneys and barristers at law, vendue masters, tavernkeepers, and retailers.

The same construction was expressed in *O'Keeffe* v. *Somerville*, 190 Mass. 110:

> It is not necessary in the present case to determine the meaning of the word "commodities", in reference to every possible application of it, but we are of opinion that it is not broad enough to include every occupation which one may follow, in the ex-

> ercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes (see *Thomas* v. *United States*, 192 U. S. 363) we are of opinion that, under the limitation to commodities, the General Court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. If this is not the necessary effect of the decision in *Gleason* v. *McKay* [134 Mass. 419] *ubi supra*, it certainly is intimated by the language of the court in the opinion.

While the federal Constitution does not contain the word "commodities" as a basis for levying excise taxes, there appears to be little, if any, difference in the limits imposed upon the interpretation of Sec. 8 of Article I by the Supreme Court of the United States and the interpretation placed on the constitutional provision of Massachusetts by the Massachusetts Supreme Court.

Mr. Justice Story in his work on the Constitution, Sec. 907, 908, says of Sec. 8 of Art. I of the Constitution:

> Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, "to lay and collect taxes, duties, imposts, and excises", constitute a distinct substantial power; and the words, "to pay the debts and provide for the common defence and general welfare of the United States", con-

stitute another distinct and substantial power? Or are the latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant material for popular declamation and alarm. If the former be the true interpretation, then it is obvious that under color of the generality of the words to "provide for the common defence and general welfare", the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, "to pay the debts and provide for the common defence and the general welfare." § 908. The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. * * * In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by Congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority.

Excise taxes were defined in *Patton* v. *Brady*, 184 U. S. 608, 617, as:

> An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.

And on page 618:

> To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it, as given by the Encyclopedia Brittanica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them.

The court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151, adopted the definition of excise taxes found in Cooley on Constitutional Law, 7th ed., page 680:

> Excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges", which appears to cover the entire ground.

A somewhat broader definition of excise taxes is found in *Thomas* v. *United States*, 192 U. S. 363, 370:

> There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, *particular business transactions, vocations, occupations and the like.* [Italics supplied.]

Sec. 901 of Title IX under consideration declares the tax imposed on all employers to be an excise tax, but as the Supreme Court said in *Flint v. Stone Tracy Co., supra,* page 145: "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act", although such a declaration may "be entitled to some weight."

It was also held in *Flint* v. *Stone Tracy Co., supra,* that the corporation tax imposed under the Tariff Law of 1909 was valid as an excise tax; but in *Gleason* v. *McKay,* 134 Mass. 419, 424, where the court was considering a tax laid on firms, copartnerships and other associations, it was said:

> It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the term "commodities", in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the Legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the Legislature has thought, upon consideration of public policy, that certain occupations or callings, of a public or quasi

> public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license.

The defendant in the above case not being a corporation, but a common law partnership, "it enjoyed no franchise or special privilege conferred upon it by the legislature, but was exercising a common right." Opinion of Justices, 266 Mass. 592–3.

In contrasting these two propositions the Justices in their opinion in 247 Mass. 589, 593, said:

> The right to set up and maintain theatres and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These are plainly not affected with a public interest, citing *Gleason* v. *McKay, supra; O'Keeffe* v. *Somerville, supra.*

And on page 597:

> The rights to labor and to do ordinary business are natural, essential, and inalienable, partaking of the nature both of personal liberty and of private property.

Cases in which excise taxes have been upheld are: *Hylton* v. *United States,* 3 Dallas 171; *License Cases,* 5 Wall. 462; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Thomas* v. *United States,* 192 U. S. 363, 370; *Billings* v. *United States,* 232 U. S. 261; *Nicol* v. *Ames,* 173 U. S. 509; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Scholey* v. *Rew,* 23 Wall. 331; *Knowlton* v. *Moore,* 178 U. S. 41; see also *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S.

397; *Stratton's Independence, Limited,* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, 183; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114.

The *Child Labor Tax Case,* 259 U. S. 20; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *United States* v. *Butler,* 297 U. S. 1; *Grosjean* v. *American Press Co., Inc., et al.,* 297 U. S. 233; and *Hill* v. *Wallace,* 259 U. S. 44, are cases where so-called excise taxes have been held not to be within the powers vested in Congress as involving matters reserved to the states.

But nowhere do we find that an excise tax has ever been imposed in this country on the natural right to employ labor in manufacturing, or in any trade or calling for profit.

It is urged that the tax imposed under Sec. 901 of Title IX is imposed on the privilege of doing business. If Congress had so intended, we think it would have said so. Sec. 901 does not impose a tax on any business in which any employer may be engaged, nor on the manufacture of any goods, wares, merchandise or commodity, but solely with respect to having in one's employ eight or more employees, the amount of the tax being based on the amount of the total payroll.

One can conceive of a case where a person might have in his employ eight employees during each of twenty days, or part of a day during a taxable year—though not at the same moment of time—but in different calendar weeks, and could not be said to be engaged in any business in so doing. For instance, a physician or a lawyer may decide to construct a house for himself by day labor. In so

doing he cannot be said to be engaged in the *business* of building houses or contracting; but simply doing what every person has a natural right to do in the pursuit of happiness and in the exercise of the liberty guaranteed to him under the Fifth Amendment of the Constitution. He employs common laborers, masons, carpenters, plumbers, electricians, painters, steamfitters, and it may well be that during the construction of his home he might find that he has had for one day, or a part of a day—though not at the same moment of time—during twenty weeks, though not even in consecutive weeks—eight employees at work in constructing his house; and while it cannot be said that his business is that of house building, under Sec. 907 of Title IX he is subject to the tax imposed under Sec. 901.

It is idle to contend that Sec. 901 of Title IX can be separated from the remainder of Title IX and from Title III in considering the purpose of Congress in enacting these Titles, or that the tax on employers is merely an excise tax for the purpose of raising general revenue. It is obvious that Title IX and Title III together were intended to compel the states to impose taxes on all employers except those exempt under Sec. 907 (c), in order to provide unemployment compensation within the states which Congress could not do. The federal government then proceeds under Secs. 902 and 903 of Title IX to retain control over the funds, 90% of which, under Sec. 902, may have been imposed under Sec. 901, and impose the conditions under which they may be distributed in the states.

It is urged that the federal act and any state act are entirely independent of each other, but in

the light of the alleged coordinating features of the Act of Congress and the requirements imposed on the state in order to obtain funds for the unemployed in each state, the court cannot shut its eyes to the compelling and regulatory features of the Congressional act. *Child Labor Tax Case, supra,* p. 37.

> "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, *as to reduce them to little more than geographical subdivisions of the national domain.* It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified. [Italics supplied.] *Carter v. Carter Coal Co., supra,* p. 295.

It is said that a state is not obliged to pass an unemployment act, and many states have not done so. Neither were employers obliged to comply with the Child Labor Law—they could have paid the tax or penalty—or farmers to reduce their acreage in accordance with the provisions of the Agricultural Adjustment Act—they could have refused the aid—but the consequences of failure to do so were such that they could not afford to do otherwise. So in this case, if a state does not pass an unemployment compensation act complying

with the requirement of Congress, or of the proper federal bureau the entire tax assessed on employers under Sec. 901 goes into the United States treasury. Such a state must itself bear whatever financial burdens result to it from unemployment in its industries. No payments for unemployment assistance are made from the federal treasury. A state may not comply at once, but if the Act is held valid the distadvantages resulting to the state and its employers and the consequent dissatisfaction of its employees, it is quite obvious, will sooner or later compel all the states to enact such legislation, and in such form as well receive the approval of the Social Security Board created by the Act. That this amounts to coercion of the states and control by Congress of a matter clearly within the province of the states cannot be denied. If valid, it marks the end of responsible state government in any field in which the United States chooses to take control by the use of its taxing power. If the United States can take control of unemployment insurance and old age assistance by the coercive use of taxation, it can equally take control of education and local health conditions by levying a heavy tax and remitting it in the states which conform their educational system or their health laws to the dictates of a Federal Board. It is a significant fact that many of the Acts in the states provide that the state law shall not remain in effect if Title IX is declared unconstitutional, which indicates beyond a doubt that the states in self-defense consider themselves compelled by the Act of Congress to enact a state law. It is plainly the duty of the courts to uphold and support the present

Constitution until it has been changed in the legal way.

While courts will not declare Acts of Congress of no effect because some other motive outside the powers of Congress may have actuated Congress in passing it, though not shown on the face of the Act, the provisions of an Act of Congress must be reasonably adapted to some purpose within the powers vested in Congress and not with a view to accomplishing some other purpose wholly reserved to the states. *Linder* v. *United States,* 268 U. S. 5, 17.

As to the wisdom, as a social aim, of providing for the unfortunate, the dependent, or those permanently or temporarily unable to earn a livelihood, we are in sympathy; but even though we may think an Act of Congress embodies a commendable social plan and are in sympathy with its purpose and intended results, if its provisions go beyond the limits of federal power and extend into the field of power reserved to the states, we must so declare. *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U. S. 330, 347.

However general such social needs may be in the states as sovereign units, they are not necessarily a part of the general welfare of the United States, *Schechter Corp* v. *United States, supra; Railroad Retirement Board* v. *Alton R. R. Co., supra; Carter* v. *Carter Coal Co., supra,* p. 290–1. If the dual form of our government is to be maintained as conceived by the framers of the federal Constitution, the general welfare of some or even of all the states *in matters reserved to the states,* when taken together, cannot be held to constitute the general

welfare of the United States within the meaning of Sec. 8 of Art. I of the Constitution.

Therefore, to provide unemployment benefits regardless of need, to persons who have worked in local employments in local trade and manufacturing within a state, not related to interstate commerce, or in any calling not related to the matters subject to the control of the Congress, is not to provide for the general welfare of the United States.

There is no warrant for taking the property or money of an employer and transferring it to his employees without compensation, not even by taxation, *Loan Association* v. *Topeka,* 20 Wall. 655, whether the purpose is a commendable one or not. Title IX, coupled with Title III, is an attempt by Congress to impose a tax on employers of eight or more as a means of assuring certain employees, deprived of employment for any reason, of a certain amount of compensation during their period of unemployment, and to regulate the conditions under which such employees shall be entitled to aid.

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. * * * The exaction cannot be rested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *United States* v. *Butler, supra,* p. 61.

If the Act is carried out as planned by Congress, and a tax is imposed on every employer which is credited against a tax imposed by the state, and, under the conditions imposed by Sec. 302 and 303 of Title III and Sec. 903 of Title IX, is paid to employees found to be eligible, it amounts, in effect, to taking the property of every employer for the benefit of a certain class of employees. The entire plan, viewed as a whole, is an attempt to do indirectly what Congress cannot do directly, and to assume national control over a subject clearly within the jurisdiction of the states.

Congress by the provisions of Sec. 903 not only takes charge of the funds raised by the states, but has undertaken to dictate the terms of state legislation in relation to the conditions under which a person is entitled to receive unemployment compensation under a state act.

The federal government has no power, granted or inherent, in respect to the internal affairs of the states. *Carter* v. *Carter Coal Co., supra,* p. 295. It has no right to say to the several states that, in order to obtain aid for the unemployed in its industries, they must enact statutes which shall provide that—

(1) All unemployment compensation must be paid through public employment offices in the State or such other agencies as a federal Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the "unemployment fund" (from State taxes) shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Sec. 904 of Title IX;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Instances are cited of appropriations by Congress for the aid of states in caring for relief of its citizens and in aid of those unable to earn a livelihood, for flood relief in the states, for relief from drought in certain agricultural states, or to relieve losses from earthquakes, here or abroad, or from disastrous fires, and particularly to aid or relieve suffering in other countries, but no special tax was imposed for these. Here the national government is undertaking to impose its will on the several states in regard to one of the oldest and most universal problems in human life: the care of children, of old people, and in aid of the unemployed. In

this country it has always been done locally or by the states. Numerous cases can be cited of appropriations made for purposes not within the connotation of the term "general welfare of the United States", but they have never been questioned, and there is no process to prevent an appropriation for such purposes by Congress, as was decided in *Massachusetts* v. *Mellon,* and *Frothingham* v. *Mellon,* 262 U. S. 447, 486, 487, and in *Florida* v. *Mellon,* 273 U. S. 12, 18; *United States* v. *Butler, supra,* p. 73. The remedy, if one is necessary, is with the people who select their representatives.

President Cleveland, in 1887, vetoed an attempted act of Congress to aid counties in Texas injured by drought, saying in his veto message:

> I can find no warrant for such an appropriation in the Constitution. The lesson should be constantly enforced that, though the people should support the government, the government should not support the people.

A unanimous court in *Schechter Corp.* v. *United States, supra,* p. 549, said that

> The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the coun-

> try, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.
>
> It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it.

As stated above, the issue is not what powers Congress ought to have to meet conditions as viewed by the executive and legislative branches of the government, but what powers are vested in Congress under the Constitution. The Supreme Court through a long series of opinions has defined those powers and the limitations upon them. If the Constitution, as construed through the years, requires amendments to meet new conditions, the way is provided therein.

While state courts have in passing on state unemployment acts held them not to be violative of the constitutional provisions of their respective states, as the Massachusetts Supreme Court in the case of *Howe Brothers Company* v. *Unemployment Compensation Commission* has recently decided, it is significant that it did not sustain the taxation provisions of the Massachusetts Unemployment Act as imposing excise taxes, but as an exercise of its police powers, and provided that the state law should not be valid in case the federal act was held to be beyond the constitutional powers of Congress—indicating, we think, that the state acted under coercion.

It seems to be generally agreed the regulation of employment in the states is a matter solely within their jurisdiction. This, we understand, was the

basis of the court's decision in the recent minimum wage law of the State of Washington for women; and only in matters where Congress has control, as in interstate commerce or in the District of Columbia may Congress regulate the wages and hours of labor.

In a case recently decided by the Supreme Court of Canada, Canada Law Reports, 1936, Part VII, page 454, approved by the British Privy Council, an act of the Dominion Parliament, relating to social insurance, was held to invade the field exclusively reserved by the constitution to the legislatures of each province; and in the case of *James* v. *Commonwealth of Australia,* 1936, A. C. 578, in which an act of the Commonwealth of Australia was under consideration to control and limit the products of agriculture, it was held unconstitutional by the British Privy Council. Lord Wright, Master of the Rolls, page 633, in holding the act unconstitutional, said:

> But these inconveniences are liable to flow from a written constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistent with any construction of the constitution which is in accord with sound principles of interpretation. To give that effect would amount to rewriting, not construing, the constitution. That is not their Lordships' function.

While we accept certain of the premises laid down by the court in the cases of *Beeland Wholesale Company* v. *Harwell G. Davis, Collector of Internal Revenue,* and Charles C. Steward Machine Company, recently decided in the fifth circuit, we are unable to adopt its conclusions as to the validity

of Title IX of the federal act. The case of *Gillum v. Johnson et al.*, decided by the Supreme Court of California, can hardly be said to have considered, except by way of dicta, the issues raised in the case at bar.

The decree of the District Court is reversed with costs, and the case is remanded to that court for further proceedings in accordance with this opinion.

BINGHAM, *Circuit Judge* (dissenting). This is an appeal from a decree of the District Court for Massachusetts dismissing the plaintiff's bill of complaint. The bill, filed November 6, 1936, was brought by George P. Davis, a citizen of Massachusetts, against the Boston & Maine Railroad, a Massachusetts corporation, praying that the defendant be enjoined from making payments to the Collector of Internal Revenue of the tax imposed upon it under Title IX of the Act of Congress of August 14, 1935, c. 531 (49 Stat. 620, U. S. C. Title 42, c. 7), and that Title IX of that Act be held not to be an Act of Congress within its powers under the Constitution of the United States. In the bill it is alleged, and it is conceded, that the plaintiff is a stockholder, owning an unspecified number of shares of stock of the defendant corporation; that the defendant is now, and was during the year 1936, engaged in the business of operating a railroad in Massachusetts, and during that time employed more than eight persons therein; that under section 901 of that Act it is required to pay each calendar year after January 1, 1936, an excise tax; and that the corporation, though requested not to do so,

nevertheless had decided to make payments under the Act.

It further appears that on November 12, 1936, Guy T. Helvering, Commissioner of Internal Revenue, and William M. Welch, Collector of Internal Revenue for the District of Massachusetts, sought and were permitted to intervene as defendants; that on November 17, 1936, the plaintiff, the defendant, and the intervenors filed a stipulation in which it was provided that—

> The only issue involved in this case, either directly or indirectly, is whether or not Title IX of Chapter 531 of August 14, 1935, 49 Stat. 620, is an act of Congress within its powers under the Constitution of the United States, or is violative of the Fifth Amendment thereof, and *the only way that that issue is raised is in respect to payments under that Title IX.*

It appears, therefore, that the single question is whether Title IX of the Act is constitutional insofar as it requires the defendant corporation to make payments of taxes into the Treasury of the United States.

Title IX, the essential provisions of which appear in the foot-note of the opinion of the court, is entitled "Tax on Employers of Eight or More", and section 901, which imposes the tax, reads as follows:

> Section 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined

in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year.

For the calendar year 1936, the rate is fixed at 1 per centum; for the calendar year 1937, 2 per centum; and after December 31, 1937, 3 per centum.

By section 907, the term "employer" as used in section 901, means any person (individual or otherwise, Sec. 1101 (3) (4)) employing eight or more persons during the taxable year for the length of time there specified; that the term "wages" means cash or cash value of all remuneration paid employees for services rendered; and that the term "employment" means any service *performed within the United States* by an employee for his employer, except agricultural labor, domestic service in a private home, services of an officer or member of a crew of a vessel on navigable waters of the United States, services of a father in the employ of his son, daughter or wife, or of a child under twenty-one for his father or mother; services performed in the employ of the United States or one of its instrumentalities; or in the employ of a State, or political subdivision thereof, or of a State instrumantality; for services performed for a corporation or organization organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, *no part of the net earnings of which enures to the benefit of any private shareholder or individual.*

It is apparent from a reading of these sections that the subject or activity upon which the tax is

imposed for a given calendar year, is a person, firm, or corporation, except those above stated, doing business within the United States in which eight or more individuals are employed; that the object of the tax is the act of the employer in having individuals in his employ; and that the tax is at a fixed rate measured by the total wages paid by the employer to those employed. It is also reasonably certain that the business of the employer, the subject of the tax, is one carried on for profit and not one where no pecuniary benefit accrues to a private shareholder or to an individual. The tax is spoken of in the Act as an excise tax.

The plaintiff contends that this is not an excise tax. At one time he argues that no tax is an excise tax except a tax upon property and then later concedes that such a tax may be one imposed on one's profession or calling, upon the manufacture, sale, use, or consumption of an article; but that it cannot be upon the doing of business or the doing it in a particular mode or form, or upon the act, not the privilege, of carrying on a business employing eight or more employees. He asserts that the tax in question is upon wages—an outgo—and that no one ever heard of a tax upon outgo. He fails to recognize that the tax is not upon the wages, that the wages paid out are merely the measure of the tax, and that the Supreme Court has expressly held that the act of making a gift *inter vivos*—outgo—may be made the basis of an excise tax upon the donor, measured by the value of the property given (*Bromley* v. *McCaughn,* 280 U. S. 124), or upon the act of using a boat, not the privilege of doing so. *Billings* v. *United States,* 232 U. S. 261 at 281. We may therefore reasonably rest assured

that because the tax in question is measured by the wages, *the property paid out,* that it will not for that reason fail of having been properly laid; nor for the reason that the act of the employer in carrying on a business employing eight or more individuals, not the natural right or privilege of doing so, is made the occasion of the tax.

It is certain that, prior to the adoption of the Sixteenth Amendment, a tax based on the ownership of property, real or personal, and the income derived from either, was a direct tax, and had to be laid according to the rule of apportionment; and that since then a tax upon income, derived from either source, is subject only to being uniform throughout the United States.

The tax here in question is manifestly not a direct tax upon property, and if it is an indirect tax, an excise, the only constitutional limitation is that it be uniform. Article 1, section 8, clause 1. It is there provided that "All duties, imposts and excises shall be uniform throughout the United States."

It is also fairly certain that the Supreme Court has held that a tax upon an incidence of ownership of property, which does not amount in fact to a direct tax upon the property itself, may be an excise. It was held, as above said, that a tax on the act of using a boat, an incidence of ownership, even though the use made of it be in foreign waters by a citizen of the United States, permanently domiciled abroad, is an excise within section 8 of Article 1. *Billings* v. *United States,* 232 U. S. 261. It reached the same conclusion in regard to a tax on carriages which the owner "kept for his own use"—the act of so keeping. *Hylton* v. *United*

States, 3 Dal. 171. In that case, Chase, Justice, after expressing the view that the power granted to Congress to lay duties, imposts, and excises, was the most comprehensive of the powers granted to Congress to lay taxes, other than the one embraced in the "general term tax", said:

> It seems to me, that a tax on *expense* is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons is of that kind; because a carriage is a consumable commodity; and such annual tax on it is on the *expense* of the owner.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, 539, the court had under consideration an Act of Congress providing that:

> Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association *used for circulation,* and *paid out* by them after the first day of August 1866, * * *.

It will be seen that this Act imposed a tax upon the act of paying out the notes of any person, State bank or State banking association used for circulation; that it was not a tax upon the notes, but upon the use made of them—the act of paying them out, an incidence of ownership.

In that case it was first contended that the tax was a direct tax, and second, that it was a tax on a franchise granted by the State. It was held not to be a direct tax or a tax on a franchise granted by a state, but was a tax upon the issuance of bank bills under the franchise of the bank; that it stood no differently than a tax upon bills of lading *issued*

by a railroad company, in the exercise of its corporate franchise for freight received, which were "proper objects of taxation within the power of Congress, and not exempt by any relation to the State which granted the charter of the railroad." And in answer to the contention that the tax was "excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank", the court replied:

> that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

Like excise taxes imposed upon an incidence of ownership, such as the act of selling liquor or of selling lottery tickets (*License Tax Cases*, 5 Wall. 462; *So. Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; *United States* v. *Yuginovich*, 256 U. S. 450); the manufacture, sale or removal for sale of articles (*United States* v. *American Chicle Co.*, 256 U. S. 446; *Patton* v. *Brady*, 184 U. S. 608); the sale or transfer of securities (*Provost* v. *United States*, 269 U. S. 443; *Thomas* v. *United States*, 192 U. S. 363; *Treat* v. *White*, 181 U. S. 264); the manufacture and sale of oleomargarine (*McCray* v. *United States*, 195 U. S. 27); on successions or receipt of property at

death (*Scholey* v. *Rew*, Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Co.* v. *Eisner*, 256 U. S. 345); and on the act of making a gift *inter vivos*, as above stated in *Bromley* v. *McCaughn*, 280 U. S. 124.

As taxes laid on such acts have been uniformly sustained as excise taxes under the power of Congress to levy duties, imposts and excises, it remains to be considered whether it is within the power of Congress to levy such a tax upon the act of doing business, or doing business in a particular manner or form, or on a particular act done in carrying on a business.

In *Thomas* v. *United States*, 192 U. S. 363, the appellant had been indicted for violation of the internal revenue laws of the United States in that, being a broker (doing a brokerage business), he had sold certain shares of stock and omitted affixing the required revenue stamps upon the memorandum of sale. He was found guilty, and a judgment sentencing him to pay a fine of $500 having been entered, sued out a writ of error. He contended that the right of sale and transfer was a natural or inherent attribute of property or ownership; and that such a natural right could not be made the occasion of a tax. The government contended that it was not a direct tax, but one "in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing"; that "Congress has the power to declare that any person who shall engage in the business or occupation of *buying* or *selling* certificates of stock shall pay a tax measured by the price real-

ized." Chief Justice Fuller in delivering the opinion of the court, said:

> The present case involves a stamp tax on a memorandum or contract of sale of a certificate of stock, which plaintiff in error claims was unlawfully exacted because not falling within the class of duties, imposts and excises, and being, on the contrary, a direct tax on property.
>
> There is no occasion to attempt to confine the words "duties, imposts and excises" to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, *particular business transactions,* vocations, occupations, and the like.
>
> Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution. As in *Hylton* v. *United States,* 3 Dallas 171, on the use of carriages; in *Nicol* v. *Ames,* 173 U. S. 509, on sales at exchanges or boards of trade; in *Knowlton* v. *Moore,* 178 U. S. 41, on the transmission of property from the dead to the living; in *Treat* v. *White,* 181 U. S. 264, on agreements to sell shares of stock denominated "calls" by the New York stock brokers; in *Patton* v. *Brady,* 184 U. S. 608, on tobacco manufactured for consumption. [Italics supplied.]

And in affirming the judgment of the lower court, he stated: "The stamp duty is contingent on the happening of the *event of a sale.*" A particular act in the conduct of the business of a broker. And in conclusion said: "As such, it falls * * * within the second class of the forms of taxation."

In *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, the plaintiff below was a Pennsylvania corporation incorporated for the purpose of "refining sugar, which will involve the buying of the raw material therefor, and selling the manufactured products, and doing whatever else should be incidental to the said business of refining." It sought to recover certain sums paid by it under protest to the defendant-collector, as unlawfully exacted under the twenty-seventh section of the Act of June 13, 1898. That Act imposed a tax upon every person, firm, corporation or company carrying on or doing the business of refining sugar, measured by the gross annual receipts in excess of a named sum. It reads as follows:

> SEC. 27. That every person, firm, corporation, or company carrying on or doing the business of *refining petroleum,* or *refining sugar,* or owning or controlling any pipe line for transporting oil or other products, whose *gross annual* receipts exceed $250,000, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of $250,000.

Here, again, the appellant contended that the tax was a direct tax. The government's contention was that it was an excise and plainly indirect; that it made "no difference how the manufacturing activities *are measured* in the imposition of the tax."

It is apparent from a reading of the section that the tax is not based on the doing of business *in corporate form,* for it is imposed upon a person or firm, as well as upon a corporation. It was limited,

however, to the doing of business in a particular way, the refining of petroleum or refining of sugar. In holding the tax to be an excise the court said (p. 411):

> Clearly the tax is *not imposed upon gross annual receipts* as *property*, but only in respect of the carrying on or doing the business *of refining sugar*. It cannot be otherwise regarded because of the fact that the amount of the tax *is measured* by the amount of the gross annual receipts. The tax is defined in the Act as "a special excise tax", and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise authority granted to it of laying and collecting excises. [Italics supplied.]

It did not trouble the court in that case that the tax was imposed only on those whose "gross annual receipts exceeded $250,000, and not on other persons, firms or corporations, whose gross annual receipts were less, and who were consequently exempted from payment of the tax. And after reviewing many decided cases bearing on the question the court concluded (pp. 412–13):

> We cannot hold that the tax imposed on the plaintiff expressly with reference to its "carrying on or doing the business of * * * refining sugar", and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the Act of Congress, a special excise tax, and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with distinctions,

> often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the question arose under section 38 of the Act of Congress of 1909 (36 Stat. 112), which reads:

> SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States, or in Alaska or in the District of Columbia, shall *be subject to pay annually a special excise tax* with respect to the *carrying on or doing business by such corporation,* joint stock company or association or insurance company, equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over

and above $5,000 received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to *labor, agricultural or horticultural organizations,* or to *fraternal beneficiary societies,* orders, or associations operated under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to *domestic building and loan* associations, organized and operated exclusively for the mutual benefit of their members, nor *to any corporation or association organized and operated exclusively for religious,* charitable, or educational purposes, no *part of the net income* of which enures to the *benefit of any private stockholder or individual.* [Italics supplied.]

The second paragraph of this section sets forth what deductions may be made from the gross amount of income to ascertain the net income by which the tax is to be measured.

The third paragraph provides for the deduction of the sum of $5,000 from the net income as determined under the second paragraph, and that the tax shall be computed upon the remainder of such net income for the year ending December 31, 1909, and for each calendar year thereafter, and requires the taxpayer to make a return on or before the first day of March 1910, for the tax of

1909, and a like return on the first day of March in each year thereafter.

Here again individuals and partnerships were exempted from paying the tax, as it was not imposed on them. (See pp. 140–141.)

In construing section 38 for the purpose of ascertaining its meaning, the court said (p. 144):

> A reading of this portion of the statute shows the purpose and design of Congress in its enactment and the subject-matter of its operation. It is at once apparent that its terms embrace corporations and joint stock companies or associations which are organized for profit, and have a capital stock represented by shares. Such joint stock companies, while differing somewhat from corporations, have many of their attributes and enjoy many of their privileges. * * * The tax is to be equivalent to one per cent of the entire net income over and above $5,000 received by such corporation or company *from all sources* during the year, excluding, however, amounts received by them as dividends upon stock of other corporations * * * subject to the tax imposed by the statute. * * *
>
> While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless, the declaration of the law-making power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore appar-

> ent, giving all the words of the statute effect, that the tax is *imposed not upon the franchises of the corporation* irrespective of *their use* in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; *that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described.* As the latter organizations share many benefits of corporate organizations, it may be described generally as a tax upon the doing of business in a corporate capacity. * * * In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deductions stated, received not only from property used in business, but from every source. * * * This interpretation of the act, as resting upon the *doing of business,* is sustained by the reasoning in *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 379, in which a special tax measured by the gross receipts of the *business of refining oil and sugar* was sustained as an excise in respect to the carrying on or doing of *such business.* [Italics supplied.]

Having ascertained the intention of Congress as expressed in the statute, the court proceeded to consider whether the statute so construed was constitutional, and said:

> It is contended that it is not, certainly so far as the tax is measured by the income of

> bonds non taxable under Federal statutes, and of municipal and State bonds beyond the Federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to the population among the States.

After recounting the provisions of the Constitution relating to the laying of taxes, and restating what was held in the *Pollock* case and in *Knowlton* v. *Moore* bearing upon this contention, the court said:

> The Act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art I, sec. 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States.
>
> Within the category of *indirect taxation,* as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the Act under consideration. The *Pollock case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business *in the designated capacity,* and this is made the *occasion* for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way. * * * The tax under

> consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi-corporate organization. * * * [Italics supplied.]

In discussing the contention that the attempted taxation was void because it taxed franchises which were the creation of the State in its sovereign right and authority, the court said:

> The inquiry in this connection is: How far do the implied limitations upon the taxing power of the United States over objects which would otherwise be legitimate subjects of Federal taxation, withdraw them from the reach of the Federal Government in raising revenue, because they are pursued under franchises which are the creation of the States?
>
> In approaching this subject we must remember that enactments levying taxes, as other laws of the Federal Government when acting within constitutional authority, are the supreme law of the land. The Constitution contains only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in *License Tax Cases,* 5 Wall. 462, 471: "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited and thus only, it reaches every subject and may be exercised at discretion." The limitations to which the Chief Justice refers were the only ones imposed in the Constitution upon the taxing power.

The court then took up the inquiry "as to implied limitations upon the exercise of Federal authority to tax because of the sovereignty of the States over matters within their exclusive jurisdiction, having in view the nature and extent of the power specifically conferred upon Congress by the Constitution of the United States." It said:

> We must remember, too, that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the States in order to support their local government.

And after restating his construction of the statute,—that the tax imposed by the Act was upon activities connected with doing business in a corporate capacity, activities which arise from and out of the exercise of franchises granted by the State, the court held:

> We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. * * * When the Constitution was framed the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the National Government from many objects upon which *indirect taxes* could be constitutionally imposed.

It then considered the case of *South Carolina* v. *United States,* 199 U. S. 437, 461, where it was held that the agents of the State government, carrying on the business of selling liquor under State authority, were liable to pay the internal revenue tax imposed by the Federal government and said that the rule to be deduced from that and previous cases was "that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character"; and that, while Federal taxation did not extend to "the means and instrumentalities employed in carrying on the governmental operations of the State," this "limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States."

It then considered the question of whether "this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a *corporation* and *exempts* a similar business when carried on by a *partnership* or *private individual* as to place it beyond the authority conferred upon Congress." It pointed out that the limitation of uniformity in laying the tax did "not require the equal application of the tax to all *persons* or *corporations* who may come within its operation, but is limited to geographical uniformity throughout the United States" and held:

> In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other pos-

> sible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another.

And in support of the proposition, refers to many cases cited in the margin.

Later the court considered the question whether the *measure* of the tax by the net income of a corporation or company received by it *from all sources* was so arbitrary and baseless as to fall outside the authority of the taxing power. As to this it said (pp. 165–167):

> The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. * * * There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be accurately used in the business. Departures from that rule sustained in this court are not wanting. In *United States* v *Singer*, 15 Wall. 111, an excise tax was sustained upon the liquor business, which was fixed by the payment on an amount not less than 80 per cent of the total capacity of the distillery. Whether such capacity was used in the business was a matter of indifference, and this court said of such a measure: "Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount

> for which by the law he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration." * * * We must not forget that the *right to select the measure* and *objects of taxation* devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. "It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed."

It seems to me that the foregoing decisions demonstrate that the act of doing business, or of doing business in a particular way or form, may be selected by Congress as a proper object for laying an excise tax; and that the act of employing individuals in a business or occupation may likewise be a proper object for an excise tax. And it also seems to me that an excise tax, in the instances mentioned, may properly be measured by the gross or net income of the business, or by the gross or net income from all sources, or by outgo; or by any other standard having relation to the object of the tax and by which the tax may reasonably be measured, as was done in the *Singer* case, where the excise upon the business of distilling liquor was measured by an amount not less than 80 per centum of the total capacity of the distillery, whether that capacity was availed of or not.

The decisions of the Massachusetts Court, construing the term "commodity" in the constitution of that State and relied upon in the opinion of the court in this case, furnish no aid in the construction of Art. 1, Sec. 8, cl. 1, of the Federal Constitution and the determination of the requisites of an excise tax thereunder, for the word "commodity",

as respects an occupation or business, is construed as limited to an occupation of business receiving governmental aid, or to such a one "as to properly call for governmental regulation." No such limitation has been placed by the Supreme Court on Art. 1, Sec. 8, cl. 1. See the *Spreckels case, supra.*

While the power of Congress to select the occasion or object of the tax and the method of measurement is discretionary, its power to select the *subjects* of taxation are apparently limited by the Constitution. Under its requirements Congress cannot select as the subject of taxation the activities of a State, or its instrumentalities, of a governmental nature, but unquestionably has the right to select the business of an individual or a firm, or a corporate organization; and Congress in the selection of the subjects of taxation under Title IX did not exceed its power, for it expressly excluded the business activities of a State and its instrumentalities, whether of a private or governmental character; and it seems to be generally conceded that when Congress, in the laying of a tax, has acted within its constitutional authority in the selection of a given subject of taxation, "the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument"—apportionment in the case of a direct tax, and uniformity for an indirect one; and that if a tax be within its lawful power, the exercise of that power may not be judicially restrained because it may indirectly affect a power reserved to the States and tend to regulate or suppress a local activity, as in *McCray* v. *United States,* 195 U. S. 27, where it indirectly tended to regulate and suppress a local

activity—the manufacture of colored oleomargarine—a matter of State control; or as in *Knowlton* v. *Moore,* 178 U. S. 41, the transmission or receipt of property on the occasion of death—the right to regulate which is likewise within the exclusive control of a State.

In the former case it was said (p. 60):

> This principle is pertinent only when there is no power to tax a *particular subject,* and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to *subjects* which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that it to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied.

(See also *Nigro* v. *United States,* 276 U. S. 332, where a lawful tax which tended indirectly to effect a regulation of a reserved power of a State, was upheld.)

And in the *McCray* case (pp. 58–59) it was held that where the activity selected by Congress for taxation was a lawful subject, its power to tax was unlimited and its motive or purpose (to suppress or regulate) could not be inquired into by the courts.

As to the power of the courts in this respect, the court said (p. 55):

> It is of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be *temporarily effectual.* The remedy for this, however, lies, not in the abuse by the judicial authority of its functions but in the people, upon whom, after all, under our institutions, reliance must be placed for the *correction of abuses committed in the exercise of a lawful power.* [Italics supplied.]

And, in the same connection, it was said (pp. 54–55) that the contention "that, because a particular department of the government may exert its lawful powers with the *object or motive* of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused . . . reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department", that "the proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions."

In considering the effect of the due process clause of the Fifth Amendment upon a lawful exercise of the taxing power, though indirectly tending to regulate or suppress a local activity, the court said:

> That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to *indirectly affect subjects not within the powers delegated to Congress.*

It is certain that the uniformity clause is complied with. That clause exacts only a geographical uniformity, and there is no semblance of ground for claiming a violation of that requirement. *Knowlton* v. *Moore,* 178 U. S. 41; *Patton* v. *Brady,* 184 U. S. 608, 622; *Billings* v. *United States,* 232 U. S. 261, 281; *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 24.

The Acts of Congress imposing an excise tax on the business activities of corporations, but exempting like business activities of a *partnership* or *private individual,* have been held within the authority of Congress. *Flint* v. *Stone Tracy Co.,* 220 U. S. at p. 158. It is there said:

> In levying excise taxes, the most ample authority has been recognized from the beginning to select some and omit other pos-

> sible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another.

(See pages 140–141 of that case.)

I do not think that Congress rendered its exercise of the taxing power illegal by reason of the exemptions stated in Title IX, or by omitting to tax business activities employing less than eight individuals. *Quong Wing* v. *Kirkendell,* 223 U. S. 59; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537, 539.

One would gather from reading the opinion of the court in this case that, on collection of the tax, Title IX at once appropriated it to the payment of unemployment benefits under the compensation laws of the States; that what it authorized was the taking of the property of the taxpayer—employer—and turning it over to his employees. But, there is not a word in Title IX providing for any such disposition. On the contrary, Title IX (sec. 905 (a)) explicitly provides for the collection of the tax by the Bureau of Internal Revenue and its payment as general revenue into the Treasury of the United States.

It is asserted that Title IX is not a revenue measure; that it does not provide revenue with which the United States may pay its debts and provide for the general welfare of the nation. But, as heretofore pointed out, the tax imposed by section 901 has all the indicia of a validly laid excise. It is to be collected by the Bureau of Internal Revenue the same as all internal revenue taxes are, and paid into the Treasury of the United States "as internal revenue collections"; and in section 905 (b) the taxpayer is required each year to make

a return under oath of his tax and file it with the collector. Title IX makes no provision for the expenditure of a penny of the tax. On its face, then, Title IX discloses that it is a revenue measure, and we are informed that it will in fact bring into the Treasury the first year of its enforcement millions of dollars, and increasing millions each year thereafter. It cannot, therefore, be claimed that Title IX is a subterfuge and not a revenue producer.

In *Nigro* v. *United States,* 276 U. S. 332, 353, a like contention was made in regard to the Anti-Narcotic Act after its amendment in 1919, in the Revenue Act of 1918. That amendment had increased the tax imposed under section 1 of the original Act, so that the income from the tax became "substantial." It mounted "to about one million a year." In view of this, the court said:

> If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston* case. (274 U. S. 289.)

The contention that Title IX is not a revenue measure is without foundation. It clearly is such, and will produce millions of dollars for the Treasury. "Taxation may run *pari passu* with expenditures." (164 U. S. 620.) The expenditures of the government for a number of years now have exceeded its revenues, and it is common knowledge that its budget for a like period has been and still is unbalanced. It cannot be said that the government was without need of revenue when Title IX was enacted.

The activity selected as the subject of the tax being lawful, the tax being clearly an excise, and a revenue measure, as disclosed on the face of the Act (Title IX) imposing it, and being such in fact and not a subterfuge—it cannot be declared unconstitutional even though it may indirectly affect a reserved power of a State.

The *Child Labor Tax Case,* 259 U. S. 20, is without application to the facts in this case. The provision of the Act there considered was section 1200 of Title XII of the Act of Congress entitled "Tax on Employment of Child Labor", 40 Stat. 1138, and reads as follows:

> SEC. 1200. That every person (other than a bona fide boys' or girls' cannery club, recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years *have been employed or permitted to work* during any *portion* of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years *have been employed* or *permitted to work,* or children between the ages of fourteen and sixteen have been *employed or permitted to work* more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, *shall pay* for each taxable year, in addition to all other taxes imposed by law, an *excise tax* equivalent to *ten per centum* of the *entire net profits* received or accrued for such year from the sale or disposition of the product

> of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Under this statute, the subjects of the tax are (1) persons operating a mine or quarry employing therein children under sixteen years of age; (2) persons operating a mill, cannery, workshop, factory, or manufacturing establishment employing children under fourteen years of age; and (3) persons operating the latter activities employing children between fourteen and sixteen years of age more than eight hours a day or six days in the week, or after seven o'clock at night or before six o'clock in the morning, any portion of a year.

And the objects of the tax were the acts of employing children in the different activities in violation of the regulations there stated.

The measure of the tax was ten per centum of the entire net profits received or accrued for such year from the sale of products of any of the activities mentioned.

In that statute, the acts made the object or occasion of the tax were in themselves direct regulations of the employer's business, in a detailed and specified manner, pertaining to matters reserved exclusively to the States, not mere aids to the collection of the tax.

In construing the law to ascertain its meaning from the language of the Act, the court said (p. 36):

> Does this law impose a tax with *only that incidental restraint* and *regulation* which a tax must *inevitably involve?* Or does it *regulate* by the use of the so-called tax as *a penalty? If a tax,* it is *clearly an excise.* If it were an excise on a commodity or other

thing of value we might not be permitted under previous decisions of this court to infer *solely* from *its heavy burden* that the Act intends a *prohibition* instead of a *tax*. But this act is more. It provides a heavy exaction *for a departure* from a *detailed* and *specified course* of *conduct* in *business. That course of business is* that employers *shall employ* in mines and quarries, children of an age *greater than sixteen years;* in mills and factories, children of an age greater *than fourteen years,* and shall *prevent children* of less *than sixteen years* in mills and factories *from working more* than *eight hours a day* or *six days in the week.* If an employer *departs* from this prescribed *course of business,* he is to pay to the Government one-tenth *of his entire net income* in the business for a full year. The amount is not to be *proportioned* in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or *employs only one for a day.* Moreover, if he *does not know* the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course, that payment is to be exacted. Scienter is associated with penalties not with taxes. The employer's *factory* is to be *subject to inspection* at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed *to stop the employment of children*

> within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable * * *. Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain even taxing acts as such, even though there has been ground *for suspecting* from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found *on the very face of its provisions.* * * * Taxes are occasionally imposed in the discretion of the legislature on *proper subjects* with the *primary motive* of *obtaining revenue* from them and with the *incidental motive* of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the *law* before us. [Italics supplied.]

Throughout the opinion in the above case, the court was particular to keep in mind the difference between a statute imposing an excise tax upon a subject properly taxable, and having merely an incidental tendency to regulate or suppress a matter within State control, and one which on its face disclosed that its direct and sole purpose was to regulate a matter of State concern, and to penalize any departure from the regulations. But the language of Title IX is not on its face reasonably capable of a construction that its sole and direct purpose was to regulate a matter of State concern

and to penalize any departure therefrom, and not to provide revenue for the Treasury of the United States.

The *Child Labor Tax Case* and kindred cases are a far cry from the one now before us. The tax here in question is certainly an excise; the tax provisions of Title IX disclose on their face that the tax is levied to provide general revenue to defray the expenses of government; that the tax is collected and paid into the Treasury of the United States as general revenue, with all the attendant circumstances commonly provided for the collection of any tax; that not a penny of it is set apart for any particular purpose, either before or after it reaches the Treasury; and that in fact it will produce millions of dollars of revenue, and therefore is a revenue tax.

The opinion of the court in this case, in substance and effect, takes the position that, if the tax is an excise, if it is a revenue producing measure, and if its proceeds are paid as general revenue into the Treasury of the United States, without being appropriated to any specific purpose, either before or after it reaches there, and although these things are so, the court may inquire into the purpose and motive of Congress in laying the tax, and if it can discover that the tax tends indirectly to regulate the taxpayer's business, it may declare the tax provisions unconstitutional, even though Title IX is on its face and in fact a tax revenue producing measure. This, according to the decisions of the Supreme Court herein referred to, it cannot do. This was conceded in the *Child Labor Tax Case*, and was so held in the opinions of the Supreme

Court in the *Craig* and *Knowlton Cases, supra,* by Mr. Justice White. See also *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44, 45. A like holding was recently had in a unanimous decision of the Supreme Court in the case of *Sonzinsky* v. *United States,* — U. S. —, decided March 29, 1937, where the court had under consideration the National Fire Arms Act of 1934 (48 Stat. 1236), requiring dealers to register with the Collector of Internal Revenue and pay a special tax of $200 a year. Sonzinsky was convicted of dealing in fire arms without having paid the tax, and contended that the Act "merely pretends to be a revenue measure and is, in reality, a police measure." In that case, it was said:

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect.

In other words, it was a valid tax even though it tended indirectly to regulate the taxpayer's business.

The opinion of this court also takes the position that section 901 of Title IX coerces the States to enact unemployment compensation laws; that the coercion is brought about in this fashion: "A State not complying [that is, not enacting such a law] must bear whatever burdens result to it from unemployment in its industries. A State may not comply at once, but if the Act is held valid, the disadvantages resulting to the State and its employers and the consequent dissatisfaction of its

employees, it is quite obvious, will sooner or later compel all the States to enact such legislation."

In this statement, the court fails to recognize that a State must bear the financial burdens resulting to it from unemployment, irrespective of the tax imposed by Title IX upon employers. It also fails to recognize that the tax upon the employer does not impose the burden upon the State of caring for its unemployed. That burden rests upon the State, and always will, whether it enacts an unemployment compensation Act or not. There is no compulsion in this. It is free to enact such a law or not as it sees fit. Its employers and the employees may think that the State should enact such a law, but that is not compulsion that results directly or even indirectly from the tax imposed by section 901 of Title IX. The most that could possibly be said of it is that so far as the State is concerned, the result would be indirect and remote, but in such a case it does not lie with the courts to say that the Title imposing the tax was enacted solely to coerce the States to enact unemployment compensation laws. What was said in *Massachusetts* v. *Mellon*, 262 U. S., at page 482, is here applicable: The burden of taxation "falls upon their [the States] inhabitants, who are within the taxing power of Congress as well as that of the States where they reside"; that "the statute [does not] require the States to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectually frustrated by the simple expedient of not yielding." The conduct of a State, in the instant case,

in enacting an unemployment law, or in refraining from so doing, being voluntary, its decision as to taking either course would seem to present a political question, not one for the courts. (Id. p. 483.) Furthermore, it appears that, in the case of Massachusetts, its unemployment law was enacted before Title IX became a law. In view of this, it can hardly be said that Massachusetts was coerced by Title IX to enact its law, and did not do so voluntarily.

It is also contended that section 902, the section of Title IX allowing the taxpayer a credit on his tax, likewise coerces the States to enact unemployment laws, but this contention stands no differently than the one just considered. It can enact such a law or not as it sees fit, and having enacted it, it can repeal it at will. The interest of a State, if any, in the allowance of the credit, is wholly remote.

It is further contended that the allowance of this credit coerces the taxpayer. Wherein it does so I fail to see. He surely is not compelled to take the credit. His freedom of choice is as undeniable as anything can be. He can take it or leave it. If he takes it he is relieved to a certain extent from paying taxes to two sovereignties on the same activity. It is now a common thing in Federal tax laws to allow a credit of a portion of a tax paid to a State upon the same activity, and even to a foreign nation. *United Shoe Machinery Corp.* v. *White,* decided by this court April 5, 1937.

It was undoubtedly discretionary with Congress to prescribe the qualifications of the credit it proposed to allow. But, as the parties in this case have stipulated that "the only way" the constitutional-

ity of Title IX "is raised is in respect to payments under that Title" of taxes by the defendant into the Treasury of the United States, we are not now concerned with the question of the construction and validity of section 902 allowing the credit.

Title IX is an act of Congress complete in itself. It does not even refer to any other Title. Its construction and validity depend upon what is stated within its four corners, not upon any other Title. See section 1103.

The tax should be sustained.

APPENDIX D

THE OLD AGE RESERVE ACCOUNT

Although we believe that the epitome of Title II, which is given in the main brief, pp. 5 to 14, covers every point that is of legal significance in this case, we here summarize for the possible convenience of the Court: (1) the method to be followed by the Secretary of the Treasury in investing the funds of the account while awaiting presentation of Old Age Benefit claims, and (2) the economic considerations which led Congress to establish a reserve account for future disbursements under Title II instead of relying on a pay-as-you-go policy.

The statute makes clear what is the method to be followed in investing the funds of the account. Section 201 directs the Secretary of the Treasury to invest these funds either in special three percent obligations of the Government, or in the ordinary obligations of the Government if the latter can be acquired on a yield basis of not less than three percent. No matter which course is followed, the national debt will cease to be held *pro tanto* by the general public, and will thereafter be owed to the Account. This result will obviously follow where the Account acquires government obligations which already are on the open market. This result will also follow if the Treasury gets funds from the sale of special obligations to the Account. For such funds would be used either to retire short-term obligations of the Government or

to buy in and cancel ordinary government obligations outstanding in the hands of the public. Section 2 of the Act of March 3, 1881, c. 133, 21 Stat. 457, U. S. C., Title 31, Sec. 741.

These consequences were foreseen and intended by Congress. H. R. No. 615, 74th Cong., 1st Sess., pp. 6–7; Hearings before House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R. 4120, p. 899; Hearings before Subcommittee of the House Committee on Appropriations, 75th Cong., 1st Sess., on Treasury Department Appropriation Bill for 1938, pp. 38–39. In other words, over a span of years, an indeterminate [2] part of the public debt will be so transferred that it will be held by the Old Age Reserve Account instead of by the general public.

The method of investing the funds in the account being clear, we now turn to the reason why any fund at all is necessary. Stated succinctly, the reason is that expenses under Title II will constantly increase. As Arthur J. Altmeyer, Chairman of the Social Security Board, stated in the Hearings before the Committee on Finance, Senate, 75th Cong., 1st Sess., on S. Con. Res. 4 (February 22, 1937, p. 3):

> This is because the number drawing pensions starts at zero and increases indefinitely, both because of a steady gain in the proportion

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[2] The size of the Reserve is not in any way determined by the Social Security Act. See main brief, pages 9–14. The size will be determined by future appropriation acts of Congress. Moreover, obviously, the nature and size of the Reserve have no relation to whether Congress continues to levy pay-roll taxes, as in Title VIII, or levies sales taxes or increases income and inheritance taxes.

> of the aged qualifying for benefits and because of the gain in the total number and proportion of the aged. Moreover, under an old-age retirement system providing pensions bearing some proportion to past earnings, the average pension payable to those retiring in successive years will increase each year for an indefinite period. Thus, under the present Federal old-age benefit plan it is thought that the total amount of monthly benefits payable each year will increase up to a figure of at least $3,000,000,000 in 1980.

As these expenditures approach this figure of $3,000,000,000, Congress, if it had made no provision in advance, might find itself in a budgetary dilemma. To raise $3,000,000,000 from pay roll taxes would require in 1980 and thereafter an onerous rate on employers and employees, probably a five percent rate on each. *Ibid.* To raise $3,000,000,000, or any substantial part thereof, from other taxes might be extremely difficult if the taxpayers were already supporting other regular governmental expenditures, including interest on the national debt. To solve this dilemma, it was determined to collect more in Title VIII pay roll taxes in the early years of this century than would be needed for current Title II benefits; and to invest certain sums (computed on actuarial principles) sufficient, when taken together with interest, to meet the difference between the disbursements likely to be incurred under Title II in 1980 and the collections likely to be made under Title VIII in 1980. Of course, in order to secure interest on the fund in the account, it is necessary to invest it in some medium or other. The particular medium now contemplated is bonds of the United States.

Section 201. At some future time another medium of investment may be chosen. But the present arrangement, as the three preceding paragraphs show, will work equally well and will have the effect not of increasing the burden of other taxes, but merely of transferring *pro tanto* the national debt so that it is held to a certain extent by the Account instead of by the general public.

Looking at the picture as a whole, we see that when the time of maximum demand for benefits comes, the Account will be prepared. It will be receiving such regular appropriations from Congress as Congress can afford in the light of all government revenues including the three percent pay roll tax on employers and employees. It will also be receiving interest on the government obligations it holds. And yet no one will be bearing an excessive burden. The pay roll taxes will not have gone above three percent. Other tax rates will not need to be raised to meet the drain of the benefits under Title II; for though total revenue collections will have to bear the cost of interest on the obligations in the reserve account, they will be relieved of the burden, *pro tanto,* of interest on that part of the national debt which otherwise would be in the hands of the public.

The above explanation of the economic basis of the reserve, we repeat, does not in our opinion bear on the legal issues in this case, but relates solely to the political and economic policy of Congress.

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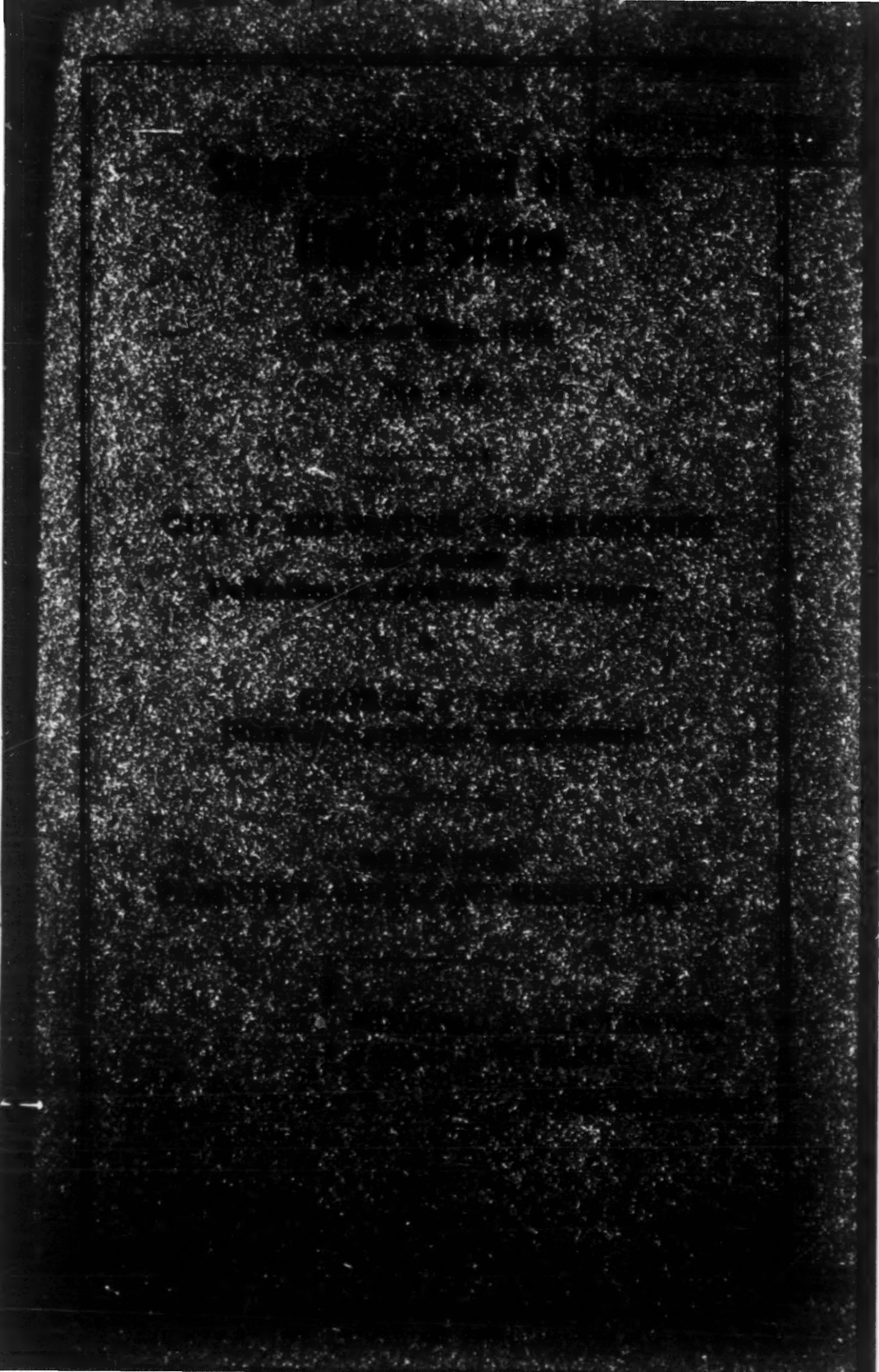

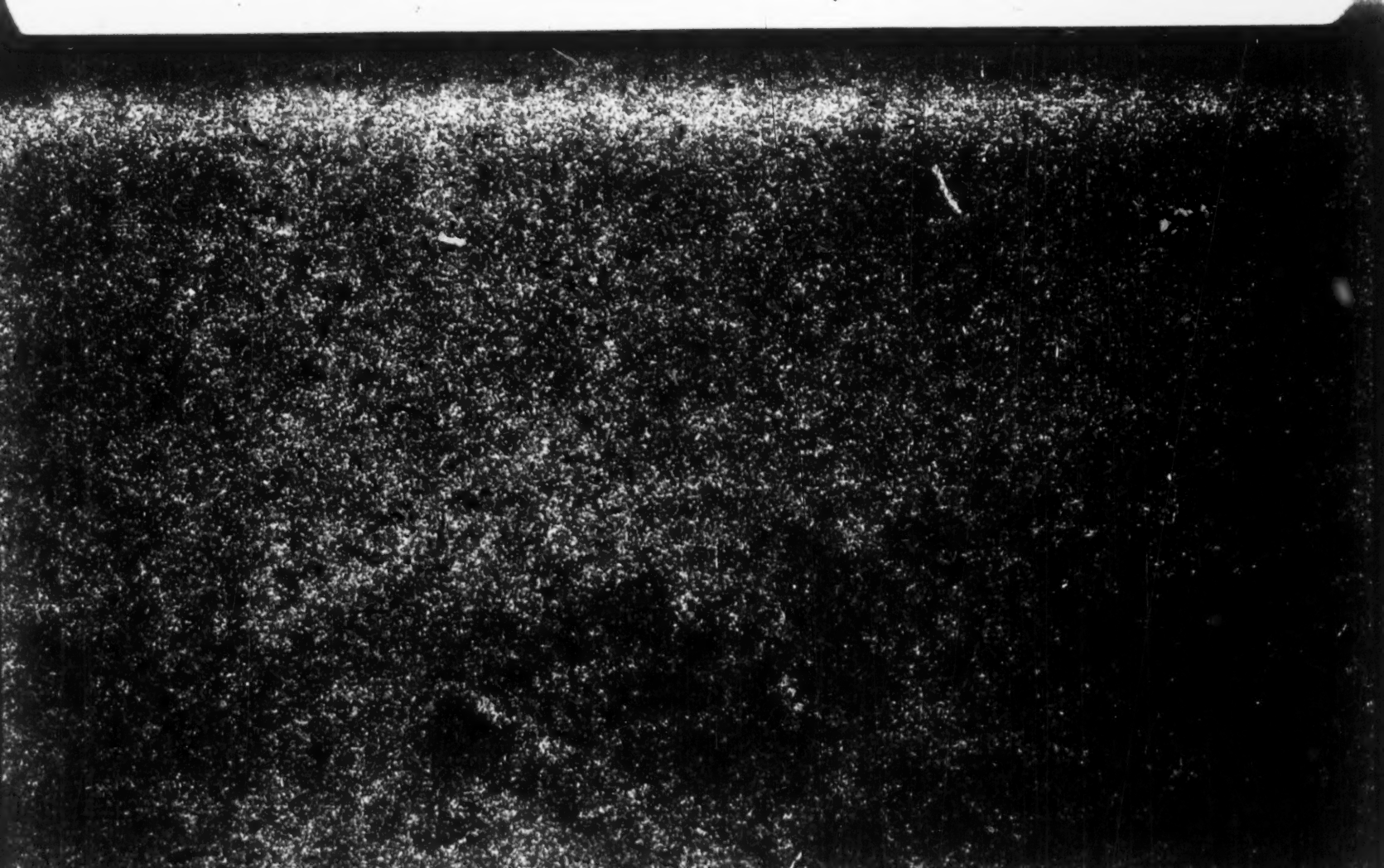

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5. To provide old age benefits such as are described in Title II is not a purpose for which The Congress has power to tax; because this purpose is not for the common defense or to pay the debts of the Government of the United States or to provide for the general welfare of that Government; and the power of The Congress to tax does not extend beyond providing for these three purposes 47–58

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STATEMENT OF THE CASE

This case is before this Court on certiorari granted to review a decision of the United States Circuit Court of Appeals for the First Circuit handed down under date of April 14, 1937, that the impositions of Title VIII of the so-called Social Security Act are not a valid exercise of the power of Congress and that the decree to the contrary, entered in the District Court for the District of Massachusetts on January 28, 1937 is reversed (R. 34; — Fed. (2d) —).

November 17, 1936, George P. Davis the plaintiff stockholder in the defendant The Edison Electric Illuminating Company of Boston brought this suit against this corporation to obtain an injunction to prevent the payment of this alleged tax, by the corporation. The necessary facts were present, to entitle the plaintiff to an injunction, if the imposition is not valid. The Commissioner of Internal Revenue and the Collector for the Massachusetts District, on their own motion were admitted as parties defendant.

THE CONSTITUTION OF THE UNITED STATES

"WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Sect. 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

. . .

"Sect. 8. The congress shall have power — to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; — to borrow money on the credit of the United States; — to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; — to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; — to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; — to provide for the punishment of counterfeiting the securities and current coin of the United States; — to establish post offices and post roads; — to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; — to constitute tribunals inferior to the supreme court; — to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; — to declare

war, grant letters of marque and reprisal, and make rules concerning captures on land and water; — to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; — to provide and maintain a navy; — to make rules for the government and regulation of the land and naval forces; — to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; — to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress; — to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; — and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

"Sect. 9. . . .

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. . . ."

"ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same."

AMENDMENTS

"Art. V. No person shall . . . nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Art. IX. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"Art. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

"Art. XVI. The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

SOCIAL SECURITY ACT, TITLE VIII, SECTIONS 804 and 802, DESCRIBED.

Title XI, Section 1105, of Chapter 531, August 14, 1935, 49 Stat. 620, 648, United States Code Title 42, Chapter 7, provides that "This Act may be cited as the 'Social Security Act'." This citation is misleading. This attempted Act is not social. It is anti-social. It attempts to put Society's burden on a fraction capriciously picked. It does not provide security. In Sections 804 and 802 (U. S. C. Tit. 42 Ch. 7 Sec. 1004, 1002) it is not an Act of The Congress within its powers under the Constitution of the United States. The reasons for this assertion are deferred until the sections have been described. They are the only sections whose validity is involved in this suit. The invalidity is intrinsic in these sections, when judged by themselves, and also when judged in the setting in which they occur.

The singularity of the Act is shown by the fact that it begins as "AN ACT To provide for the general welfare by **establishing a system of Federal old-age benefits,** and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes." and then proceeds in eleven titles, and ends with the provision that **"This Act may be cited as the 'Social Security Act'."** (Type not heavy in original.)

It is not an Act to provide general revenue for the Government of the United States.

Title VIII is, "Taxes with respect to employment".

Title II is, "Federal old-age benefits".

Section 804 is: —

"EXCISE TAX ON EMPLOYERS

Sec. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years of 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum."

Section 802 is: —

"DEDUCTION OF TAX FROM WAGES

Sec. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 801 is paid with respect to any wage payment, then, under regulations made under this title, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same individual by the same employer."

Employees are not made liable to pay a tax. It is not paid from any money which they get or retain the right to get. There is really an imposition in the name of an excise tax of 6% on employers who in return are accorded the right to perform fully their contracts with their employees by paying 97% of the agreed amount. The 3% under Title IX is additional.

Section 801 is: —.

"INCOME TAX ON EMPLOYEES

Section 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(5) With respect to employment after December 31, 1948, the rate shall be 3 per centum."

Section 811 is: —

"DEFINITIONS

Sec. 811. When used in this title —

(a). The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except —

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Casual labor not in the course of the employer's trade or business;

(4) Service performed by an individual who has attained the age of sixty-five;

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(7) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

By the conjunction of Section 811 with the earlier sections, the excise, and the income tax, described are not upon wages. They are measured by wages of $3,000 or less in any calendar year in an employment not at agricultural labor, or domestic service in a private home, or casual labor, or the other excepted services described in Section 811.

Title II, Section 210, describes the kind of wage earners in the kinds of employment that are to become entitled to old-age benefit payments under Section 202 after attaining the age of sixty-five years and January 1, 1942.

This description in Section 210 is identical in words and punctuation with the description in Section 811 except that item (4) of Section 811, which excludes from the tax, service performed by an individual who has attained the age of sixty-five, does not appear in Section 210 and therefore the succeeding paragraphs are numbered one lower.

It is obvious that the exclusion of individuals over sixty-five from the tax liability is because they have come into the benefit class under Section 202 by reaching sixty-five years of age.

1. THE ATTEMPTED LEVY IS TO PROVIDE OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II.

On the face of the Act, even ignoring all that has been said publicly and in The Congress and in the Committee reports, the conclusion is inescapable that the impositions under Title VIII are to provide for the benefits under Title II.

It cannot be supposed that men in The Congress possessed of their reason would select as the basis for raising general revenue for the Government of the United States, the income of a portion of the small wage earners to the exclusion of all other persons gainfully employed and to the exclusion of all large wage earners, and to the exclusion of wealth.

It cannot be supposed that such men in The Congress would pick for the production of general revenue for the Government of the United States, the employment of a portion of the small wage earners to the exclusion of all others gainfully employed and to the exclusion of the large wage earners and to the exclusion of profits, income, gross receipts, net receipts, extent of business, and wealth used or owned.

The conclusion is inescapable that these impositions under Sections 804 and 802 were for the purpose of providing the fund set up by Section 201 to furnish the benefits described in Section 202.

The men in Congress proclaimed that this was a Social Security Act. It furnishes no security for old-age benefits unless the sums which the employers are required to pay by Sections 804 and 802 are to furnish that security. Section 804 ultimately calls for 3% of this limited kind of wages of a limited group. Section 802 calls upon the employer for another 3%, and permits the employer to reimburse himself by paying to

this limited group of wage earners only 97% of the sum which he has agreed to pay his employees.

It is not to be supposed that the men in Congress would permit this reduction of wages unless to give to the wage earners so imposed upon, the security of a fund for old-age benefit payments to them.

Section 201, which spoke at the same time — August 14, 1935 — as Sections 804 and 802, provided that "There is hereby authorized to be appropriated to the Account for each fiscal year". It is evident that the source of this appropriation was the money to come from Sections 804 and 802.

This is confirmed by the postponement of the beginning of benefit payments to January 1, 1942. If the Government of the United States from its general revenues ought to provide benefit payments for workers over sixty-five years of age, there is no reason for postponing those benefits for six years. It is manifest that the reason for this postponement was to give time within which the impositions under Title VIII would accumulate sufficiently.

It is only if these impositions are security for these benefits that the Title "Social Security Act" could be adopted honestly.

Thus far, the matter considered is the text of the attempted statute read in the light of general information. The Court is asked to consider now the particulars surrounding the attempted passage of the Act.

June 28, 1934, the President, by Executive Order No. 6757, created the Committee on Economic Security and provided further for a technical board and staff for the same.

In November, 1934, the President appointed an Advisory Council on Economic Security.

January 15, 1935, the Committee on Economic Security reported to the President.

January 17, 1935, the President transmitted this report with his approval to The Congress in a special message urging prompt action.

This report covers fifty pages dealing with the gravity of the problems of economic want and insecurity. It recommends a general outline for legislation by The Congress and by the States, broad enough to include what later entered into the so-called Social Security Act. Nowhere does it contain any suggestion that the proposed Federal tax shall be to provide revenue for the general purposes of the Government of the United States.

The Committee's letter of transmittal to the President says of the measures proposed: — "They represent, however, our best judgment as to the steps which ought to be taken immediately toward the realization of what you termed in your recent message to the Congress 'the ambition of the individual to obtain for him and his a proper security, a reasonable leisure, and a decent living throughout life.' "

The report shows, convincingly, that the excise and the income tax described in Title VIII were intended not as taxes in the true sense but as compulsory contributions toward the old-age benefits described in Title II, namely: —

"OLD-AGE SECURITY. To meet the problem of security for the aged we suggest as complementary measures, noncontributory old-age pensions, compulsory contributory annuities, and voluntary contributory annuities, all to be applicable on retirement at age 65 or over.

"Only noncontributory old-age pensions will meet the situation of those who are now old and have no means of support. Laws for the payment of old-age pensions on a needs basis are in force in more than half of all States and should be enacted everywhere. Be-

cause most of the dependent aged are now on relief lists and derive their support principally from the Federal Government and many of the States cannot assume the financial burden of pensions unaided, we recommend that the Federal Government pay one-half the cost of old-age pensions, but not more than $15 per month for any individual.

"The satisfactory way of providing for the old age of those now young is a contributory system of old-age annuities. This will enable younger workers, with matching contributions from their employers, to build up a more adequate old-age protection than it is possible to achieve with noncontributory pensions based upon a means test" . . .

"Contributory annuities are unquestionably preferable to noncontributory pensions. They come to the workers as a right, whereas the noncontributory pensions must be conditioned upon a 'means' test. Annuities, moreover, can be ample for a comfortable existence, bearing some relation to customary wage standards, while gratuitous pensions can provide only a decent subsistence" . . .

"It is only through a compulsory, contributory system of old-age annuities that the burden upon future generations for the support of the aged can be lightened" . . .

"Because of the large number of people involved and the other duties imposed on the social insurance board (which we recommend should have responsibility for the administration of all types of social insurance), we deem it desirable that the taxes to finance this system should not become effective until January 1, 1937, . . ."

. . .

"We recommend that the contributory annuity system include, on a compulsory basis, all manual workers and non-manual workers earning less than $250 per

month, except those of governmental units and those covered by the United States Railroad Retirement Act." . . .

"The compulsory contributions are to be collected through a tax on pay rolls and wages, to be divided equally between the employers and employees" . . .

"Both the tax on employers and the employees is to be collected through the employers, who shall be entitled to deduct the amount paid in the employees' behalf from wages due them" . . .

"We suggest that the Federal Government make no contribution from general tax revenues to the fund during the years in which income exceeds payment from the funds, but that it guarantee to make contributions, when the level of payment exceeds income from contributions and interest, sufficient to maintain the reserve at the level of the last year in which income exceeded payments" . . .

"No benefits are to be paid until after the system has been in operation for 5 years, nor to any person who has not made at least 200 weekly contributions, nor before the member has reached the age of 65 and retired from gainful employment." . . .

"The plan outlined above contemplates that workers who enter the system after the maximum contribution rate has become effective will receive annuities which have been paid for entirely by their own contributions and the matching contributions of their employers." . . .

Clearly defined are these taxes as essentially compulsory contributions to an old-age annuity fund for out-payment after January 1, 1942 to those over 65.

This report portrays a scheme for legislation substantially as carried into the text of the so-called Social Security Act. It emphasizes that the so-called excise and income tax in Title VIII are but compulsory

contributions to produce the fund described in Title II to pay old-age benefits.

January 17, 1935, Senator Wagner presented to the Senate [S. 1130] and Representatives Doughton and Lewis presented to the House [H. R. 4120] bills incorporating the President's recommendations. These were immediately referred to the Senate Committee on Finance and the House Committee on Ways and Means, respectively.

Committee hearings were held on these bills.

April 4, 1935, Representative Doughton introduced a bill [H. R. 7260] which on that day was referred to the Ways and Means Committee.

The next day, the Committee reported [House Report 615, 74th Congress, 1st Session, April 5, 1935] the bill which the Congressmen later purported to pass.

April 11, 1935, the House resolved into Committee of the Whole House on the State of the Nation, for consideration of the bill.

April 17, 1935, the members of the House purported to pass the bill.

In May, 1935, the Senate Committee on Finance considered the bill and reported favorably with amendments [Senate Report No. 628, 74th Congress, 1st Session, 1935].

June 19, 1935, the Senate purported to pass the bill with the amendments which had been reported by its Committee.

The matter went to Conference, and was reported back by the Conference Committee.

August 8, 1935, the members of the House purported to pass the Act.

August 9, 1935, the Senators did the same.

August 14, 1935, the President approved, as Public Act No. 271 of August 14, 1935, 74th Congress, 1st Session, 1935.

The Report No. 615 submitted April 5, 1935 by the Committee on Ways and Means, which recommended the enactment of the particular law in the terms of the so-called Social Security Act, contains a number of significant statements as to its purpose and expected effect.

The Report contains no suggestion that the Act is designed to raise general revenue. It is directed throughout to a consideration of the needs of relieving against distress due to the various conditions covered by the various Titles.

"Title II: A system of Federal old-age benefits, payable to people who have reached the age of 65, will begin in 1942. These benefits are to be measured by wages, and are payable wholly regardless of the need of the recipient." . . .

"Title VIII: An income tax, measured by a certain percentage of wages (beginning with 1 percent in 1937 and increasing to 3 percent by 1949), is levied on most wage earners, with certain large groups, such as domestic servants and agricultural laborers, exempted. An excise tax, measured at the same rates on wages paid, is levied on employers, with similar exemptions. These taxes first take effect on January 1, 1937." . . .

"The Committee on Ecomonic Security . . . made a unanimous report to the President in January of this year, which the President transmitted to both Houses of the Congress, with his endorsement of the legislation recommended therein, . . . "

"The bill is designed to aid the States in taking care of the dependent members of their population, and to make a beginning in the development of measures which will reduce dependency in the future. It deals with four major subjects: Old-age security, unemployment compensation, security for children, and public health." . . .

"To keep the cost of Federal-aided State pensions under title I from becoming extremely burdensome in future years, and to assure support for the aged as a right rather than as public charity, and in amounts which will insure not merely subsistence but some of the comforts of life, title II of the bill establishes a system of old-age benefits, paid out of the Federal Treasury, and administered directly by the Federal Government." . . .

Support for the aged cannot thus be made a right unless the taxes which they have paid are essentially contributions to the fund to which they have this right.

The Report [Senate No. 628, May 1935] follows the general course of the above-described Report of the Committee of the House. This Report says: —

"As the titles of the bill indicate, it consists of a series of related measures designed as a unified, well-rounded program of attack upon the principal causes of insecurity in our economic life. These measures may be divided into five broad fields: (1) Old-age security, (2) unemployment compensation, (3) aid to dependent children, (4) public health measures, and (5) aid to the blind."

"Provision for the people who are now old and dependent upon the public for support is the first essential in old-age security. It will not, however, solve the entire problem. The cost of free pension systems the world over has tended to increase rapidly and in course of time has necessitated the establishment of contributory annuity systems." . . .

"There is serious danger that if only title I is enacted, this country will, before long, adopt the principle of free pensions for all old people, to be paid for from general taxes. Such a system would involve costs far exceeding any of the figures mentioned, and would bring with it evils of the most serious character, with

much greater burdens upon industry than anything that is proposed in this bill.

"In view of the growing number of the aged, the great cost which title I is almost sure to entail in future years, if no other provisions are made for old-age security, and the desirability of providing old-age security as a right and not as public charity, this bill proposes also inauguration of a system of Federal old-age benefits, computed on a reserve basis." . . .

The report in the Senate, as well as that in the House, confirms the conclusion to be drawn from the report of the Committee on Economic Security, that the impositions in Title VIII are not taxes for general revenue but are compulsory contributions to create the fund defined by Title II for payment of old-age benefits.

It is immaterial that the impositions are to be paid into the Treasury of the United States. That is the place from which the benefits defined by Section 202 are to be paid under Section 207, to the recipients; and that is the place where under Section 201 the reserve account is to be kept.

That is the normal place for collections for a particular purpose.

If from the language and the context, the purpose for which the imposition is laid can be ascertained, the Court is not required to remain blind thereto.

> *Grosjean* v. *American Press Co.*, 297 U. S. 233.
> *Trusler* v. *Crooks*, 269 U. S. 475.
> *United States* v. *Butler*, 297 U. S. 1.

Ordinarily, an imposition described by The Congress as a tax, is payable into the Treasury of the United States. This does not establish that it is a revenue measure.

The title of an Act and its whole content may be inspected to see that The Congress intended the imposition to be for a particular purpose and not merely to produce general revenue for the United States.

Hill v. *Wallace*, 259 U. S. 44.
Child Labor Tax Case, 259 U. S. 20.
Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
United States v. *Constantine*, 296 U. S. 287, 294, (semble).

The impositions defined in Sections 804 and 802 are clearly not taxes for general revenue of the Government of the United States.

Cases cited above.

They are compulsory contributions to the reserve account defined by Section 201, from which, under Section 207, benefits are to be paid to the persons described in Section 202 as defined in Section 811.

2. THE IMPOSITION IS NOT AN EXCISE AS THAT WORD IS USED IN THE ONLY CLAUSE OF THE CONSTITUTION WHICH EMPOWERS THE CONGRESS TO LEVY TAXES.

This is one of the grounds for the decision of the Circuit Court of Appeals (R. 30, — Fed. (2d) —). That court states the reasons for this, in the opinion handed down the same day, April 14, 1937, in the case of *Davis* v. *Boston and Maine Railroad*, dealing with the invalidity of Title IX of the so-called Social Security Act (R. 55 in that case, — Fed. (2d) —).

"Excise" had a well understood meaning in England and in the Colonies for at least one hundred and forty years before it was used in the Constitution. It meant an inland levy on selected tangible property, or upon the owners of it, because of the activity in which the property was moving. The motion might be manufacture; it might be intermediate sale; it might be ultimate sale commonly amounting to consumption. The antithesis was the direct tax upon property in general, certainly land, when taxed on a rate fixed by its static appraised capital value and possibly when measured by its annual unwrought return in rent, income or products, and, debatably, upon personal property so appraised or judged.

Both the direct tax and the excise were prominently property taxes, — one regardless of its activity or inactivity, and the other taking that activity into consideration.

Dr. Johnson, in the Third Edition of his Dictionary in 1766, defined "excise" as "a hateful tax levied upon commodities, and adjudged not by the common judges of property". In the same time and place, he defined "commodity" as "interest, advantage, profit, convenience of time or place, wares, merchandise".

"Commodity" suggests as the principal thought, merchandise. If a town meeting were urged to place a tax on commodities, the voters attending would think of whisky, ale, tea, and not of incorporeal rights.

Adam Smith in 1776, in "The Wealth of Nations", says: "The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use. There can never be any doubt either concerning the goods which are subject to those duties, or concerning the particular duty which each species of goods is subject to. They fall almost altogether upon what I call luxuries, excepting always the four duties above mentioned, upon salt, soap, leather, candles, and, perhaps, that upon green glass."

The Massachusetts constitution of 1780 indicated direct taxes to be the normal source of revenue but gave the legislature authority to impose "reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever". It is submitted that these words "reasonable" and "produce" and those following it were not set out as limitations on the kinds of excises. They were there as clarifications of the intrinsic meaning of the word. "Commodities" was used in association with other words descriptive of tangible things. No intention to add more by the word "Commodities" is to be inferred. "Merchandise" and "wares" were already included in "goods". There is no more tautology in the addition of "commodity" to mean no additional class than in the addition of "merchandise" and "wares" to "goods". These two words could not add a class which was not already covered by "goods".

The Constitutional Convention of New York in 1788 urged its representatives to obtain several amendments to the Constitution one of which was, "That the

Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them." (1 Elliot's Debates on the Federal Constitution, p. 329.) These were the words of men who understood excises as falling on tangible things.

In the Massachusetts Convention in 1788, Mr. Symmes, in speaking to this phrase, said: — " . . . Congress may lay an impost on the produce and manufactures of the country, which are consumed at home." (2 Elliot's Debates, p. 72.)

Luther Martin in 1788 said: — "By the power to lay excises, — a power very odious in its nature, since it authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns, — the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort." (1 Elliot's Debates, p. 368.) If this forceful gentleman had conceived of the idea that Congress could lay an imposition on the natural universal right to employ a consenting wage earner or the natural universal right of the wage earner to obtain wages by the consent of the employer, he would have mentioned it at this point. Evidently he conceived of an excise as an imposition on tangible property.

In the New York Convention in 1788, Chancellor Livingston said: "We may naturally suppose that wines, brandy, spirits, malt liquors, &c., will be among the first subjects of excise." (2 Elliot's Debates, p. 341.) He said this, when speaking to the proposed amendment to prohibit excises on manufactures of the United States. He was talking of an imposition on tangible property.

In the Virginia Convention in 1788, Mr. Nicholas said: "We are next terrified with the thought of excises. . . . They are a kind of tax on manufactures." (3 Elliot's Debates, p. 243.)

In the "Debates in the Congress of the Confederation" in 1783, Mr. Wilson, in discussing the probability of an excise, said that wine and imported spirits had borne a heavy excise in other countries and might be adopted in ours; that coffee is another object which might be included. (5 Elliot's Debates, p. 40.)

Hamilton speaks of the excise as "Taxes on Articles of Consumption". (The Federalist, No. 21, Dec. 12, 1787, p. 182.)

So says Ellsworth in the Connecticut Convention (2 Elliot 192). It is the property which is taxed, and not the act of consuming it. The short-cut expression "consumption taxes" generally means taxes on goods designed for early consumption and manufactured, sold, and bought for that purpose (The Federalist, p. 267, 275).

Gallatin speaks of it as an excise on "consumable commodities" (Writings of Gallatin, p. 73). Evidently he means by "commodities" tangible articles. Men do not "consume" incorporeal rights.

Hume, in his history of England published approximately thirty years before the adoption of the Constitution, in speaking of the situation at the time of the long Parliament when the excise novelty came in, said: — "So extremely light had government hitherto lain upon the people, that the very name of *excise* was unknown to them; and among the other evils arising from these domestic wars was the introduction of that *impost* into England. The parliament at Westminster having voted an excise on beer, wine, and other commodities, those at Oxford imitated the example and conferred that revenue on the King." (5 Hume, Ed.

of 1861, p. 269.) It was an imposition on these commodities used in the sense of goods. It was an impost laid on tangible property.

Clarendon in the History of The Rebellion in England (Vol. II, p. 453) said substantially the same. He also says "This was the first time that ever the name of payment of excise was heard of or practised in England."

Commodity was used in the same sense that in later days it has been used in transportation. A commodity rate as distinct from a class rate, is a rate on a particular kind of merchandise.

Blackstone, twenty-two years before the adoption of the Constitution, after speaking of other forms of taxation, said: "Directly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." (1 Blackstone, p. 308.)

Evidently "commodity" is here used in the sense of tangible property.

Encyclopedia Britannica, in the Third Edition, 1797, gives Blackstone's definition as still the definition.

Even more convincing than the contemporary definitions for 1788, are the many usages exemplary of the real character of an excise as the word then was used in the communities contracting by the Constitution.

Overwhelmingly, and it would seem safe to say universally, the imposition was on tangible property usually articles of merchandise for current use, often described as "commodities".

Early British Excises

What has been called the first British excise act — that of March 28, 1643, imposed an impost on articles

of consumption listed in a schedule, such as ale, beer, cyder, perry, strong waters, and other described articles.

In January, 1644, this was extended to other "commodities made or growing in England not formerly charged with excise". It was these classes of merchandise that were called "commodities".

They were indifferently described as "commodities" and as "goods".

On the return of Charles, the laying of excises on selected goods continued. It was on commodities, — meaning, by that term, merchandise — in manufacture, trade or consumption.

The Revenue Act of 1777 (17 Geo. III, c. 39) cited for the Defendant laid a duty of one shilling per annum for every male servant of the kinds described. It was a luxury tax like the window tax. This is shown by the fact that the Act contained these words: — "Provided always, That this Act shall not extend to any Servant who shall be retained or employed bona fide for the Purposes of Husbandry or Manufacture, or of any Trade or calling by which the Master or Mistress of such Servant earn a Livelihood or Profit." This luxury tax was to be administered in the same manner as the window tax, which in turn was in reality a tax on the house crudely measured by the number of windows. Its repeal was because it was decided that it did not bear a sufficiently direct relation to the value of the house.

The Act of 1777 did not describe the levy as an excise. Even if it had, little light would have been shed thereby on the meaning of "excise" in the States of the United States. They were not much influenced after July 4, 1776 by taxation by the British Parliament.

Meanwhile, the term "excise" had come to get a meaning in the Colonies, by use there.

Excises in New York before 1788

By October 23, 1713, New York had "An act for laying a duty on Goods sold by Auction, vendue or out-cry." (Vol. I of "The Colonial Laws of New York from the Year 1644 to the Revolution, Transmitted to the Legislature by the Commissioners of Statutory Revision, Pursuant to Chapter 125 of The Laws of 1891", p. 789.)

May 16, 1691, there had been laid "an Excise upon all Brandy, Rum and other Distilled Liquors to be retailed within this Province under fifteen gallons" (Vol. I, same publication, p. 248). This act included an excise on other wines and liquors.

December 23, 1775, there is "An Act to Regulate the Collecting the Duty of Excise on Strong Liquors retailed in this colony". (Vol. IV, same publication, p. 1.)

Other similar acts laying an excise on liquors followed from this time to 1784. (Vol. I, Laws of the State of New York passed at Sessions of the Legislature held in the Years 1775 to 1788, p. 109, 660.)

December 1, 1756, an excise on tea was imposed. (Vol. IV, Colonial Laws, *supra*, p. 105.)

The expression "excise" in New York in this period appears to be confined to inland duties or imposts upon commodities in the sense of "goods".

Excises in Pennsylvania before 1788

February 18, 1777 there is "An act authorizing the Collectors of the excise due and to become due on Spirituous Liquors to collect the same and directing the Mode of obtaining Tavern and other Licenses for other purposes therein mentioned." (IX Statutes at Large of Pennsylvania, 1776–1799, p. 55.)

Excises in Massachusetts before 1788

Nearly contemporaneously with what has been asserted to be the first excise law in England, the Colony of New Plymouth in 1646 enacted "That these excises shalbe imposed to be payd by all that are lycensed to retayle wines strong water and y^{t} sell Tobaccoe as followeth viz^{t} upon every gallon of Spanish wine eight pence . . . " This is followed by a list of other strong waters, wines, tobaccos, and certain fish. This excise was on the "goods". (Plymouth Colony Laws, 1836, p. 85.)

June 24, 1692, the Massachusetts Colony enacted that there may be paid "an excise upon all wines, brandy, rhum and other distilled liquors, perry, beer, ale, cyder, and metheglin, that shall be sold [by] retail" to be paid by the retailer (Vol. I, Acts and Resolves of the Province of Massachusetts Bay, Chapter 5, p. 32).

Thereafter follow many acts, imposing an excise on "goods" (Vol. I, same, pp. 57, 272, 391, 475, 527, 662, 738; Vol. II, same, pp. 203, 849; Vol. III, same, pp. 495, 568, 750; Vol. IV, same, p. 219).

In this Colony it would appear by investigation of the many laws in the four volumes that the term "excise" was confined to this class of taxes.

The last reference above cited from the Laws of The Colony was in the year 1759.

The usage continued in the State. The Act of November 1, 1781, Chapter 17, was "An Act laying certain Duties of Excise on certain articles therein mentioned" (Vol. I, Laws of Massachusetts, p. 60). Others in like tenor followed in 1782 and 1783 (Same volume, pp. 62, 78, 85; Laws and Resolves of 1782, Chapter 33, p. 92).

It is respectfully submitted that the prior and contemporaneous utterances overwhelmingly tend to the

conclusion that an excise was in character an inland duty or impost on a tangible commodity in manufacture or in sale either in the course of trade or for consumption. It was not cut out of the activity. It was cut out of the goods. It did not rest on the activity. It rested on the goods, and was payable for the quantum of goods by the manufacturer, the seller, or the purchaser of them.

This "page of history is worth a volume of logic" (Mr. Justice Holmes, 256 U. S. 349).

If this position is wrong, and the term "excise" included an imposition on something other than selected tangible property or on the owner or handler of it, because of the property, it becomes necessary to define what other subject it covered according to the common meaning of the day. It is respectfully submitted that it is inconceivable that the intelligent people of the common run in the thirteen States could have understood that the word included an imposition on the state of being of exercising the universal natural right to employ, for wages, other men who consented to that employment, in a manner not injurious to the public good.

Supporters of this tax have urged that it is a tax upon a privilege. There is no privilege. The state of being on which the imposition is made is not derived from government or from public authority in any manner. Privilege contrasts with common natural opportunity. Contrast the privilege to do business without liability for debts, as in corporate form. Any dictionary of common meanings shows that "privilege" as used in this context means something not of common right.

The derivation confirms this. Privilegium was a law against or in favor of an individual. It was compounded of lex, a law, and privus, private.

There is nothing here present, even of an incorporeal nature, to satisfy the term. If this is a privilege, — breathing, sleeping, or holding decorous discussion of the weather may have an excise imposed on it equally well.

It is believed that no statute, of the United States or of any State, a party to the Constitution, lends the slightest color to the contention that there is something here which is subject to excise as that word is used in the Constitution.

If this imposition is not in character an excise, it is submitted that there is no occasion to go further. It is announced in the attempted Act as an excise tax. It does not conform to the requirements for a valid tax of any other kind, and it is not an excise.

There must be some limit to what is an excise.

Presumably the having of lungs with which to breathe, and nerves which permit sleep, will be conceded to be something which Congress cannot excise, and that if an attempted tax thereon could be supported it must meet the requirements of a capitation tax. On the other hand, a whisky tax is a foremost example of an excise. Between the two there is a boundary line which the men in Congress may not cross, and on crossing which they will not be acting as Congressmen. This case involves no necessity to set that boundary line. It is sufficient, if the Court observes that this particular imposition is beyond the bounds.

The word "excise" had a meaning in 1788, when the contracting thirteen States used it in their compact. For present purposes, that is the meaning which it has today, and the only meaning which it can have. Neither the Court nor The Congress is empowered to change that meaning by interpretation or expansion. Such procedure would mutilate the contract which was made.

Undoubtedly properties of modern times — as, for example, automobiles, — never thought of in 1788 may come within the meaning which the word had in 1788. But, if the state of being, of having individuals in a man's employ, — a thing of a character which existed in 1788, — did not then come within the meaning of the word, it is not there now.

The unlettered experienced carpenter set to saw a pile of boards to a given length, has found that if he saws each from the last one before, in most cases, by a process of negligible errors, he has created a grave one, and that the boards of his later sawings are wrong. Accordingly, he has adopted the policy of sawing them all by the application of his first one, which he marks as a pattern. It is not presumptuous to urge the worth of this example of the unlettered carpenter upon this cultured and enlightened Court.

The meaning in the Constitution of the word "excise", is the meaning that it had in 1788 in common usage of the common run of men in the thirteen contracting States who made the contract in State conventions of representatives chosen by those men of the common run. Judges and lawyers and statesmen formed a very small minority of the common men in the thirteen contracting groups. The understanding of the eminent and revered draftsmen and promoters of the Constitution is of no value to fix the meaning in any respect at variance with the common usage. They were not the ones who made the contract.

The tax here attempted is novel. A brief on it may seek first with reason the Court's own application of the Constitution to the proposal, in the exercise of its own skillful judgment on an original question, regardless of what other Justices have said at other times. Decorum does not require that the Justices be approached on this novel question as a congregation

of mere reporters of the language used by other Justices, in disposing of other questions.

Turn next from this appeal to the original judgment of this Court on this novel question. The Court now is asked to recall and to observe that nowhere in the precedents of the prior decisions and language of the Supreme Court of the United States is there any indication that this attempted tax is within the powers of The Congress; and that there is much in those decisions and in that language to show that such a tax is not within those powers.

An attempted act may be clearly without the powers of The Congress and a particular litigant nevertheless may have no right to invoke the judgment of the Supreme Court of the United States.

Massachusetts v. *Mellon*
Frothingham v. *Mellon* } 262 U. S. 447.
Florida v. *Mellon*, 273 U. S. 12.

Consequently, the fact that the validity of appropriation of the money of the United States in questionable ways has not been questioned before that Court, carries no implication that the appropriations were lawful, or approved by the people of the United States.

It may well be, also, that many unlawful appropriations have been thought so favorable to those who might otherwise have questioned them, that they would discourage any attempt to prevent them.

It is only in the last twenty years that inland taxes of the United States have become so burdensome, that it has been worth the extensive effort of many people, to prevent unlawful appropriations.

A person in terms obliged by an attempted invalid act to pay money to go into the Treasury of the United States, has a right to a decision.

United States v. *Butler*, 297 U. S. 1.

In considering the validity or not of a novel tax, attempted, the Court is not foreclosed from exercising its own judgment, by the misunderstandings of The Congress or of the Supreme Court of the United States, even if they have persisted unabated for a century.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S. 429.

An imposition on a particular class of tangible property, in manufacture, use, gift, bequest, or sale, may be sustained as an excise if it meets the other constitutional requirements, including that the end is to provide revenue for the general welfare of the Government of the United States and that the selection is not capricious or the tax anti-uniform.

Magnano v. *Hamilton*, 292 U. S. 40.
Bromley v. *McCaugn*, 280 U. S. 124.
N. Y. Trust Co. v. *Eisner*, 256 U. S. 345.
Billings v. *United States*, 232 U. S. 261.
McCray v. *United States*, 195 U. S. 27.
Thomas v. *United States*, 192 U. S. 363.
Cornell v. *Coyne*, 192 U. S. 418.
Spreckels Sugar Ref. Co. v. *McClain*, 192 U. S. 397.
Patton v. *Brady*, 184 U. S. 608.
Treat v. *White*, 181 U. S. 264.
Knowlton v. *Moore*, 178 U. S. 41, 84.
Nicol v. *Ames*, 173 U. S. 509.
Springer v. *United States*, 102 U. S. 586.
Railroad Co. v. *Collector*, 100 U. S. 595.
Scholey v. *Rew*, 23 Wall. 331.
Veazie Bank v. *Fenno*, 8 Wall. 533.
Pacific Ins. Co. v. *Soule*, 7 Wall. 433.
License Cases, 5 Wall. 462.
Hylton v. *United States*, 3 Dallas, 171.

Important documents, and paper, particularly commercial paper are tangible and valuable because of that fact.

Patton v. *Brady*, 184 U. S. 608, 617.
Cook v. *Pennsylvania*, 97 U. S. 566.

It has been held in at least one case that a franchise is a sufficiently palpable kind of property to permit an excise of it.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 155, 162.

A tax does not cease to be an excise and become an income tax, merely because it is placed on income, if that is under the circumstances a reasonable criterion for the rate or amount of tax which should be imposed on that property. Income received is property.

Flint v. *Stone Tracy Co.*, 220 U. S. 107.

The Supreme Court of the United States never has held that the natural harmless state of being or natural harmless conduct privileged or unprivileged is subject to excise. Where the special privilege was a franchise derived from government and long recognized as itself a piece of property, although intangible, and produced property, *Flint* v. *Stone Tracy Co.*, permitted its excise.

This does not suggest that the state of being an employer with the consent of the employee in a common harmless calling is a privilege, or as such or otherwise, is property or anything but a natural universally attainable state not derived from government.

These decisions of the Supreme Court of the United States are supported by the prevailing and confirmed interpretation of the word "excise" by the Supreme Judicial Court of Massachusetts throughout the existence of the State, and recently with emphasis, that it is an imposition on property in industrial or trade

movement whether the word be used in the Constitution of the United States or in the constitution of the Commonwealth of Massachusetts.

Opinion of the Justices in 1933, 282 Mass. 619, *and many cases therein cited.*

The natural operation of employing with the consent of the employee, is not a privilege or any other type of property, tangible or intangible, which may be subjected to excise.

Opinion of the Justices, March 27, 1929, 266 Mass. 592, 595, *semble.*

" . . . we are not aware of any case in which an excise tax is shown to have been imposed upon the use of one's hands in simple manual labor, or upon the making of a simple contract, without the use of any auxiliary method, device, or machinery that might be availed of to establish one's rights under the government in courts and elsewhere. . . "

Opinion of the Justices, Knowlton, Morton and Braley, in 1908, 196 Mass. 624.

"In this Commonwealth, in dealing with the term 'commodity,' it has been held that an ordinary 'agreement or mode of transacting business' is not within its meaning, and cannot be made the subject of an excise tax. . . " (Same page)

" . . . the word 'is not broad enough to include every occupation which one may follow in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation'." (Same page)

Property may not be taken by government from one for another even for public advantage or welfare without just compensation.

Louisville Bank v. *Radford*, 295 U. S. 555, 601, 602.
United States v. *Butler*, 297 U. S. 1.
Railroad Retirement Board v. *Alton R. R. Co.*, 295 U. S. 330.

It makes no difference that it is done under the guise of a tax or is the product of a tax.

Loan Association v. *Topeka*, 20 Wall. 655.
Calder v. *Bull*, 3 Dallas, 386.
Miles Planting Co. v. *Carlisle*, 5 Ct. of Ap. D. C., 138, 146.

Even if a tax is levied expressly for the purpose of obtaining general revenue, if it appears "in the light of its history and of its present setting" that it is for a purpose which the Constitution does not permit the law-making body to accomplish, the tax is bad.

Grosjean v. *American Press Co. Inc.*, 297 U. S. 233, 250.

Heretofore, *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397, has been put forth for the defendants Helvering and Welch as their main authority to support the contention that the attempted levy at bar is an excise within the Constitution. This decision contains nothing at variance with the definition of the word "excise" for which the plaintiff contends. The tax in the cited case (p. 398) was expressly "upon the gross annual receipts, in excess of a named sum, of every person, firm, corporation or company carrying on or doing the business of refining sugar".

The sole question was whether this was a direct tax requiring apportionment. It was not. It was on receipts of property. There is nothing in the case even remotely to suggest that an excise may be laid on the state of being of having employees.

Therefore, however high the motives, this attempt by the men in Congress to take from a fraction of employers the money to be given by the Treasury of the United States to other men on their reaching sixty-five years of age, is not the levying of an excise but is a capricious confiscation.

3. IN TESTING THE VALIDITY OF THE LEVY ATTEMPTED IN SECTIONS 804 AND 802 AN UNCHANGING DECISION MUST BE MADE FOR ALL PURPOSES, AS TO WHETHER THE LEVY IS FOR GENERAL REVENUE ONLY OR IS FOR OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II.

The levy should not be deemed to be for such benefits, at one stage of argument in order to meet the charge of capriciousness, and for general revenue at another stage in order to meet the charge of absence of federal purpose.

Not infrequently, in briefs and arguments on this subject, there appear efforts to justify this attempted levy as a general revenue measure and to deny that the purpose of it is to provide old age benefits. Nevertheless, at other places in the same briefs and arguments, there appear efforts to justify the selections and exemptions which have been made, by pointing out the relation of these selections and exemptions, to the classes of persons who, under Title II, are to share in the benefits. Manifestly this is fallacious. The attempted levy is, for all purposes, either for general revenue, or for old age benefits. It cannot be sometimes for one and sometimes for the other.

4. IF FOR GENERAL REVENUE—AND EVEN IF NOT—THE ATTEMPTED LEVY IS SO CAPRICIOUS AND SO LACKING IN UNIFORMITY AS NOT TO BE IN CHARACTER A TAX.

The Circuit Court of Appeals found it unnecessary to decide this question.

This imposition is capricious and not uniform throughout the United States whether it be laid to produce general revenues of the Government of the United States or to provide the funds with which to pay the old-age benefits given by Section 202.

If general revenue is the purpose of the attempted imposition, there is no basis in reason for picking out certain faultless employers to bear the whole burden so as to relieve wealth generally from taxation to furnish the revenue. The time-honored example of a tax on red-headed men only, is no more beyond the bounds of reason than is this attempted imposition.

If the purpose is old-age benefits, there is no more reason for removing the burden from a tax on wealth to the shoulders of possibly propertyless employers who are not the cause of the old age.

Even if employers were selected to bear the burden, still, the attempted imposition would be capricious and anti-uniform, because there is no attempt to cover all in the same class.

If this attempted imposition is an excise, the subject matter excised is the state of being of having employees. In order to be uniform throughout the United States, it must cover everyone having that state of being throughout the United States. It is not contended that uniformity of a reasonable excise would be defeated by reasonable exemptions, reasonably selected, or that reasonableness is defeated by the fact that the Court can think of a wiser way of doing it.

In the present imposition, all three elements of reasonableness are lacking.

If men over sixty-five years of age ought to have an annuity or old-age benefit, they ought to have it because of that fact and not because of the type of employment in which they have been engaged. If employers ought to pay an excise for the state of being of having employees, they ought to pay it when they have that state of being.

The benefit and the burden, are capriciously limited in this attempted imposition.

It is the known fact that the imposition upon non-agricultural labor is equivalent to confining the imposition to certain States to the approximately complete exclusion of other States. It is capricious to deny the over sixty-five benefits to farm laborers and to relieve their employers from an imposition placed on other employers. Industry and trade do not produce age sixty-five any sooner than does agriculture.

House Report No. 615, hereinbefore described, submitted April 5, 1935, had attached to it schedules of the state of employment in normal times in the United States, as follows:—

Total number of gainful workers	48,830,000
Total number of workers, operators, self-employed (including the professions)	12,087,000
Total number of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9,389,000
Estimated number of workers potentially benefited	27,354,000
	48,830,000

The gainful workers are divided, then, into:—

	Percentage
Owners, operators, and self-employed	24.8
Employees in occupations not subjected	19.2
Employees in employments subjected (including unemployed)	56.
	100.

Only 56% of the gainful workers are potentially to be benefited. The employers of only this 56% are subjected to the imposition.

Even this 56% is too large a figure, because as the Committee report says: — "The actual number of employees covered by the tax would be considerably smaller . . . due to unemployment."

The employers of the 56% bear not only the burden of caring by so much for the aged among the 56%, but also the burden of their share of taxes to meet the public expense for poor relief and assistance to the remaining 44% and of the unprovided for balance of the 56%. Crudely repeated: — The employers of the 56% pay 100% of the benefits for the 56%, and also 56% of 100% of the poor relief and assistance. These are average approximations subject to wide variations in individual cases and States. They are sufficiently accurate to show the capriciousness of the imposition on the 56%.

These capricious impositions do not deal in small amounts.

Senate Report No. 628, hereinbefore described, estimated that a tax of 1% on pay roll amounts to only about $\frac{1}{8}$ of 1% on sales. This referred to the tax under Title IX, dealing with unemployment. The employment there was more limited than the employment on which Title VIII attempts to impose. But, even

disregarding this, the report in this way indicates that when the impositions under the two Titles are in full sway, so that 9% on the pay rolls must be paid, the imposition is equivalent to a general sales tax of 3%.

As the tax is on employers in trade as well as in industry they, except in the case of imported merchandise sold, are taxed twice.

The United States Census Report for 1930, giving the figures for the year 1929, show the value or sale of

Industrial products	$70,434,863,000,
Wholesale trade	69,291,548,000,
Retail trade	49,114,653,000.

The employers in the production and trade in domestic industry in this way pay two taxes inevitably; and where the products pass through both wholesale and retail trade, three taxes. What passes from wholesale trade into the hands of the manufacturers as the raw material of those manufacturers, calls for another payment. It is beyond the possibility of accurate mathematical statement.

These compoundings are measurably avoidable in a general retail sales tax not falling on goods in the earlier operations of wholesale trade and manufacture. To some extent they are avoidable in a general manufacturer's tax. They cannot be avoided in a pay roll tax.

The Senate Committee Report estimated that for the year 1951 the tax receipts would amount to $2,724,000,000, and that in every year after 1943 they would amount to more than $2,000,000,000.

Whether this huge tax can all be passed on to the consumer, let him who claims the vision of an inspired prophet give the answer. It is the known fact to anyone familiar either with industry or with commerce, that in many cases the levy cannot be passed on without the destruction of the trade. If it cannot be passed on, the employer inevitably meets financial destruction when subjected to such a huge tax.

In what has been said above, attention has been called to the capriciousness of confining the benefit and burden to 56% of the gainful workers. This is not the whole story. If gainful workers ought to have an annuity after age sixty-five, so should all other persons. There is no reason for favoring those who have been able to get work and to work, to the exclusion of those who have been unable to get work or unable to perform it if they could get it. The true comparison, when dealing with old age annuities, is between the whole population, which may be taken, for this purpose, at 125,000,000. The estimated number of workers potentially to benefit — 27,354,000 — is less than 22% of the population. Less than 22%, then, of those who have to [illegible]d the danger of living after sixty-five are preferentially selected for this potential benefit.

If it be granted that those over sixty-five years of age should be provided for by society, it is capricious and anti-uniform to take the burden off wealth subject to tax and put it on a fraction of employers who are not the cause of men growing old and who have the same state of being of having employees which is enjoyed by a vast number of other people who are not subjected to the imposition.

The mere fact that property excised is not equally distributed throughout the United States does not make the tax anti-uniform.

> *Knowlton* v. *Moore*, 178 U. S. 41.
> *Head Money Cases*, 112 U. S. 580, 594.

Nor does the fact that other kinds of property are not taxed, at the same rate or at all if the selection is reasonable and not capricious.

> *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.
> *Van Oster* v. *Kansas*, 272 U. S. 465.

An excise otherwise reasonably imposed to provide revenue for the general welfare of the Government of the United States may still be uniform even if reasonable exemptions are reasonably made.

Jeffrey Mfg. Co. v. *Blagg*, 235 U. S. 571.
N. Y. Central R. R. Co. v. *White*, 243 U. S. 188. (semble).
Florida v. *Mellon*, 273 U. S. 12.

A capricious selection of class of property, class of persons, or rate gradation is indicated by repeated language of the Supreme Court of the United States to make an attempted excise into an anti-uniform confiscation, without tax character.

Grosjean v. *American Press Co., Inc.*, 297 U. S. 233, 251.
Colgate v. *Harvey*, 296 U. S. 404, 422, 424.
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535.
Stebbins v. *Riley*, 268 U. S. 137.
Louisville Gas & Elec. Co. v. *Coleman*, 277 U. S. 32.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Bromley v. *McCaugn*, 280 U. S. 124, 139.
Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266, 272, *semble of a regulation.*
In re Opinion of The Justices, 85 N. H. 562; 154 Atl. 217 (semble).

This Court said in *Brushaber* v. *Union Pacific R.R.*, 240 U. S. 1, 24, that the breadth of the taxing power granted to Congress does not extend to a case "where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a

taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was **so wanting in basis for classification as to produce such a gross and patent inequality** as to inevitably lead to the same conclusion. (Type not heavy in original.)

The question recurs:—If the purpose of the levy is to provide general revenue, what conceivable reason can be advanced for turning from wealth and all usual objects of taxation, and for excising the harmless and laudable state of being of having employees in industry and in trade but not in agriculture or in domestic service however luxurious, and for picking upon incomes howsoever small under three thousand dollars? It is high caprice.

5. TO PROVIDE OLD AGE BENEFITS SUCH AS ARE DESCRIBED IN TITLE II IS NOT A PURPOSE FOR WHICH THE CONGRESS HAS POWER TO TAX.

The Circuit Court of Appeals so holds (R. 28).

This purpose is not for the common defense or to pay the debts of the Government of the United States or to provide for the general welfare of that Government. The power of The Congress to tax does not extend beyond providing for these three purposes.

The States when they set up the United States as a Government, did not make it an eleemosynary institution. The States imposed on the United States no duty to support the sick, the infirm, the unemployed, or the aged of the several states. The States respectively have that duty. As the States did not turn over to the new Government, this duty, they did not turn over the power to tax to provide for its performance. The States respectively continue to need the whole of that taxing power. They still have the whole of it. They did not turn over to the new Government the power to compel themselves to perform their respective duties to provide for the unfortunate. New Hampshire and South Carolina did not empower the new Government to draw from them or from their inhabitants the money with which to support the needy of Virginia and New York. The several States did not give to the new Government the power to tax to provide funds to make gifts not incident to the performance of its duty to govern within its category. The limits of its welfare were and are coincident with the limits of its category. Society's duty to care for the unfortunate rests on the State. It is within the State's category of government. The inhabitants of a State do not have two sovereigns to look to, for support. Governing by

providing for the care of the needy of a State is as much beyond the powers of the United States as governing interstate and foreign commerce, is beyond the powers of the State.

The people of the States are not subject to taxation by two sovereigns for a single purpose. If the purpose is to provide for the Government of the United States, a State may not tax for it. If the purpose is to provide for the Government of the State, the United States may not tax for it. The duty to govern and the power to tax are co-extensive and no more.

An imposition to provide old-age benefits regardless of need, to persons who are working or have worked in local employments in local trade and manufacturing within a State, not related to interstate or foreign commerce, or in any calling related to the matters subject to be governed by The Congress, is not to provide for the general welfare of the Government of the United States.

No question is presented in this case as to the beneficence or wisdom of old-age benefits to the needy or to the wealthy.

Ignoring payment of debts of the Government of the United States and providing for the common defence of the Government of the United States, no tax by The Congress is authorized unless it is to provide for the general welfare of the Government of the United States. The men in Congress who chose the Title for Chapter 531, said that it was "An Act to provide for the general welfare by establishing a system of Federal old-age benefits . . . " This selection of title suggests their avenue of approach; but this choice does not make the payment of such old-age benefits a part of the general welfare of the Government of the United States.

The limits upon the taxing power are not set by "welfare", only. They are set by the limits upon the

kind of welfare for which the tax may be levied. It must be the limited kind of welfare which is "general" and it must be the limited kind of welfare which is "of the United States." In this limitation, "of the United States" evidently is used in the sense of Government of the United States. The phrase would not be changed in meaning if put in the form "for the General Government and not for the State Governments".

In the Constitution, Article I, Section 8, it is obvious that "of the United States" qualifies not only "general welfare but also "common defence" and "debts". The qualification is used in the same sense in the three applications. "Debts" of the United States do not mean debts of the territory or of the people within the territory. They are the debts of the Government of the United States, either incurred or assumed. Equally, it is the general welfare of the Government of the United States that is described as the purpose to provide revenue for which The Congress may tax.

If it had been intended that The Congress should have power to legislate for the general welfare of the territory of the thirteen States, the Constitution would have said so. There does not appear in any clause of the Constitution, nor in the sum total of it, a grant of power to legislate for the general welfare of those residing in the territory of the several states separately or added together. There could not be a grant of such power in a constitution designed to preserve the existing complete sovereignty of the several States in all matters which related to the welfare of the people of those respective States, where the State could legislate concerning that welfare without interfering with the external relations of the group of States or the mutual relations between the States.

It is not to be supposed that a constitution would grant to The Congress of the United States a power to

tax to provide revenue for the general welfare of the territory of the United States when that Congress had been given no power to legislate for the general welfare of that territory.

The acquiring, the holding, or the disposing of territory outside the confines of the particular States was an external matter and by the Constitution was made a part of the "general welfare of the United States". Such territory could be obtained by treaty or by war—sovereign powers expressly granted to the United States. The particular powers granted, all relate to foreign relations or to mutual relations, and none to the governing of the composite of the thirteen territories.

If it were not for the phrase, "general welfare of the United States" the Constitution would contain no grant of any power to tax except to pay the debts and provide for the common defence. It is only in this third classification of objects — "general welfare of the United States" — that there is found any power to tax for the purpose of running the government of the United States including therein all those things other than payment of debts and providing for common defence which the United States may do.

In determining the meaning of this phrase, "general welfare of the United States", it is respectfully urged upon the Court that what is to be looked for is the meaning of that phrase in 1788 to the ordinary people of the thirteen States which joined in making the contract tendered to them, respectively, for adoption. It makes no difference what any of the draftsmen or proponents thought that it meant, if that differs from the common understanding of it which the three million ordinary men and women of the times should have had when they were deciding whether or not to adopt it.

The Articles of Confederation which were the forerunner of the Constitution, made among the same

thirteen sovereign States that made the Constitution, contained the phrase, "welfare". These Articles start off with the agreement that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled". By Article III they entered into a "firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attacks made upon them or any of them on account of religion, sovereignty, trade, or any other pretense whatever." Anyone knows without argument that this gave no power to the Confederation to govern the territory of the thirteen sovereigns for the welfare of the citizens of those States. The welfare which the Confederation was to care for, was the welfare in external relations — general, as distinct from local or internal, and mutual, in the relations between the sovereigns.

When the words "General Welfare", came into the Constitution from the same States which had used them in the Articles of Confederation, they meant the same thing. The external relations — such as war, defensive or aggressive; acquisition of external territory by treaty; foreign commerce, naturalization — were made clear. The mutual relations — such as interstate commerce; postal communication, bankruptcy which would affect debts and credits of men in different States, patent rights, money, were made clear. These foreign relations and mutual relations, with such implications as arise from them, comprehend all that was put into the hands of the Government of the United States. The governing in those matters was what constituted the general welfare of that government. It was for that

government that the power to tax was given. All the specifically described powers, and all the generally indicated powers, of the Government of the United States fall into one or another of these two classes, — foreign relations and mutual relations.

The terms "general" and "of the United States" are not terms of extension. They are terms of restriction upon the kind of welfare to provide revenue for which the Congress may levy a tax. They stand opposite to the restrictions of "State" or "local" in defining the welfare for which a State may levy a tax.

The novel feature of the Constitution of the United States was the erecting of two absolute sovereignties over one territory. Thirteen sovereigns erected a new sovereign but retained all the sovereign powers except those transferred to the Nation expressly or by reasonable implication. The thirteen States were the contracting parties who did this by ratifying, in separate Conventions, in the respective States, the Constitution which had been proposed by the draftsmen of the document.

Welfare evidently is served by bringing arid lands into needed cultivation. Nevertheless, the Supreme Court has said: — "While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation". (*Kansas* v. *Colorado*, 206 U. S. 46, 92).

As far as it may be done by legislation, the control of the relation between employer and employee, the rate of wages, the withholding of wages to build reserves, the insurance against accidents, the making of reserves for the employee when he no longer or not for a time can earn wages, within a State, in labor local to that State, between residents or operators within the State, and not in the course of interstate commerce, is in the legislature of the State and not elsewhere. The Congress has no more control over it than has the Canadian Dominion Parliament or that of Great Britain. That local relation is not a feature of the welfare of the Government of the United States. If it turns out to be that this feature of the welfare of each State calls for similar or the same control in each other State by the legislature of this other State, these forty-eight States' welfares do not hatch out into the general welfare of the Government of the United States.

Picture, if you will, the consternation of the men of the thirteen sovereign States, engaged in considering whether or not to enter into the compact of the Constitution, if they had been told that they were handing over to the new Nation the control of the way in which the aged within a State, needy or wealthy, should be supported, and power to draw from the State of Georgia or South Carolina a part of the money with which to support the aged, indigent, or wealthy, in the State of New York or Massachusetts. The surprise would have been great, to know that The Congress could regulate the employment relation internal in a particular State and provide that an employer must, whether he wished or not, give to an employee, whether he demanded it or not, a minimum wage which must include not only a reasonable wage and a living wage but also an old-age annuity. It is self-evident that what the employer must pay in taxes for old-age benefit he cannot pay in

larger wages currently to enable the thrifty employees to provide for their own old age. The attempted imposition says to the employer that he shall pay to the employee only 97% of what he agreed to pay him in local employment in a State between residents of that State for services to be performed therein. Should the contracting parties, in adopting the Constitution, have understood that they were giving away this power?

The contracting parties, the men of the several States, never conceived that they were giving away this power to a new, distant sovereign. They had no reason to conceive it. They made no such grant. Instead they reserved any such power, if it existed, to the people of their separate sovereign State.

Of course, if The Congress may impose on a non-wealthy few the support of the many over sixty-five years of age, whether wealthy or indigent, The Congress may do the same as to the support of those over thirty years of age. If the power exists, The Congress is the one to say where the line shall be drawn. It makes no difference that no one would suppose that The Congress would put the support of the many, needy or wealthy, of some States, upon the few wealthy or poor of other States. It is what the men in Congress have attempted in the proposed Act now at bar. The granting of such a vast power, the adopters of the Constitution never conceived of. No such grant was made.

The support of men and women who have come to be sixty-five years old in the respective states or who cannot get employment is no more for the general welfare of the Government of the United States than is the keeping the citizenry of the United States from becoming drug addicts and thereby likely to be unable to earn a living or to fight for the United States or to

vote intelligently to choose the President and the Senators and the Representatives in The Congress thereof.

Nevertheless, it seems that the Supreme Court is unanimous that provisions of an anti-narcotic act, not to collect an excise on a dangerous article of commerce, but primarily to suppress that intrastate trade would not be for the general welfare of the United States in the sense in which those words are used in the Constitution and that they would invade the territory of government of the States.

Linder v. *United States*, 268 U. S. 5, 17.
United States v. *Doremus*, 249 U. S. 86, 95.
United States v. *Jin Fuey Moy*, 241 U. S. 394, 401.

Local commercial activities and employment relations completed wholly within a State, howsoever common they may be in every State, are not a part of the general welfare of the Government of the United States.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.
United States v. *Butler*, 297 U. S. 1.
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330 (*a fortiori*).
Child Labor Tax Case, 259 U. S. 20.
Hill v. *Wallace*, 259 U. S. 44.
Hammer v. *Dagenhart*, 247 U. S. 251.

In the range of interstate commerce, where Congress has authority, "Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly" (Hughes, C. J., in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 317).

In the case cited, it would seem to be that, if there were no possible relation to interstate commerce, the Court was unanimous.

Carter v. *Carter Coal Co.*, 298 U. S. 238.

If no relation to interstate commerce or other substance within the regulatory power of The Congress is involved, it seems that the Court is unanimous that an Act for a compulsory pension system is not within the powers of The Congress.

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330, 362, 368, 375, 381.

The court is unanimous that Congress has no power to regulate the financial relation between employers and employees such as old-age annuities or other wages in a local business unrelated to interstate commerce.

Schechter Poultry Corp. v. *United States*, 295 U. S. 495.

The present attempt is to regulate wages by providing that the employer need pay only 97% of what he agreed to pay but that he must, as a part of the wage, furnish a continuation of a portion of the wage after the earner reaches sixty-five years of age and ceases to be in his employ. The State where this local employment occurs may deem that it would be wiser to regulate the relation in a different way, to provide no or a smaller annuity with no or a smaller compulsory contribution. The same thing cannot be done by The Congress and by the State Legislature. If it is a subject for legislative regulation at all, the Tenth Amendment says that it is to be regulated by the State Legislature and not by The Congress.

The Supreme Court, holds by implication that regulations of the relations between employers and employees by impositions on employers to provide a

reserve fund for unemployment benefits to persons formerly employed in employments in the State's category whether by these employers or by others, are not within the power of The Congress, because these impositions are within the powers of the State legislature.

W. H. Chamberlin, Inc. v. *Andrews*, (November 23, 1936), 299 U. S. VII, 57 S. C. R. 122; 271 N. Y. 1, 2 N. E. Rep. (2nd Ser.) 22.

They cannot be in the legislative control of both sovereignties.

Collector v. *Day*, 11 Wall. 113, 124.

Impositions for old-age benefits do not differ in this respect from those for unemployment benefits.

The particular limit to "general welfare", as to which Hamilton and President Madison differed and President Monroe vacillated, is not involved. None of them suggested that any such regulations of employment obligations and relations within a State come within this phrase. None of them, it seems, would have supported a power in The Congress to compel employers and employees in purely local employment to contribute to a fund for old-age annuities for others.

President Jackson, May 27, 1830, vetoed the Maysville Road Bill on the ground that such an appropriation could not be said to be for "general welfare" and that Congress ought not to expend where it has not jurisdiction (2 Richardson, 483, 492, 639). President Buchanan, February 24, 1859, vetoed the Act for the endowment of a college in every State with the message: — "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective States." (5

Richardson, 547) It seems that his meaning would cover as well — "for the purpose of supporting the aged people of the respective States". President Cleveland in 1887 vetoed an attempted Act of The Congress to aid Counties in Texas injured by drought. In his message he said: — "I can find no warrant for such an appropriation in the Constitution" (8 Richardson 557). Like an echo of a receding past, now growing inaudible, comes the rest of the message: — "the lesson should be constantly enforced that though the people support the Government the Government should not support the people." These convictions have particular force held as they were by revered leaders of the party in control of The Congress whose members are responsible for the attempt now before the Court. The limits set by the Constitution are not newly invented now, to defend against newly conceived attempts to invade.

There is no concurrent sovereignty of the Nation and of the separate States. The Nation is the absolute sovereign in its category of government. Each separate State is absolute sovereign in its category of government. The boundary line between the categories takes the place of the boundary line between territories of neighboring sovereigns.

Collector v. *Day*, 11 Wall. 113, 124.

Nothing is "general welfare of the United States" except that which is within the boundary lines of its category. "United States" as used in the Constitution is not a territory. It is a sovereign government. The State government is a sovereign government.

6. IN FACT AND IN LAW, IN THE SECTIONS UNDER CONSIDERATION, 804 AND 802, THIS IS NOT A TAXING STATUTE. IT IS AN ATTEMPTED STATUTE TO REGULATE THE WAGE RELATION BETWEEN EMPLOYERS AND EMPLOYEES IN EMPLOYMENT WITHIN THE SEVERAL STATES.

It requires that in return for their work, the employees receive from their employers, as wages not only their weekly or monthly money but also an insurance policy for more money after they reach the age of sixty-five. The Congress has no power so to regulate.

It is a State power, if it is legislative.

West Coast Hotel Co. v. *Parrish*, March 29, 1937, 300 U. S. ——, 57 S. C. R. 578.

The British Privy Council, on January 28, 1937, in Appeal No. 101 of 1936 — *The Attorney General of Canada, Appellant* v. *The Attorney General of Ontario and Others, Respondents*, handed down a decision affirming a decision of the Supreme Court of Canada (In the matter of a Reference 1936 Canada Law Reports, Part VII, page 454) and holding that an imposition analogous to that under Title IX of the Social Security Act is not characteristically a tax for a Dominion purpose and is *ultra vires* of the Parliament of Canada. On this subject there is an evident comparability between the organic act for the Dominion of Canada in its relation to the Provinces, and the Constitution of the United States.

The Act held to be *ultra vires* purported to make levies on employers and employees, to be paid by revenue stamps, to provide a portion of an unemployment compensation fund of which the balance was to

be provided by the Dominion. The seemingly controlling words of the opinion are: —

"That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied." . . .

"In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employees in each Province, and as such is invalid."

(Above quotations not compared with official text.)

The legislatively controllable wage relation, in local matters within a State, whether in present money or in old age benefits, is within the powers of the Government of the State and not within the powers of the Government of the United States.

The State may enforce its own policy that the old age benefit shall be larger or smaller or none at all and that thrift shall be encouraged by confining old age assistance to needs only, and by not building up a class of pensioners.

If the employer is forced by the United States to contribute toward an old age benefit fund, it makes no difference whether the exaction is called a tax or is called a contribution. It is a regulation of the terms of employment whereby the employer must as a part of the wage contribute something more for the old age of the employee.

The States by the Constitution not only did not give this power to the United States but also by the Ninth and Tenth Amendments, they expressly withhold the power.

The Congress has no power so to regulate the relations of the people within the several States, even by calling the regulation a tax.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1936

No. 910

GUY T. HELVERING, COMMISSIONER AND OTHERS

Defendants-Appellees-Petitioners

v.

GEORGE P. DAVIS

Plaintiff-Appellant-Respondent

MEMORANDUM AS TO RIGHT TO RELIEF IN EQUITY

[May, 1937]

Manifestly, this suit "arises under the Constitution or laws of the United States." The authorities are collected on pages 3 and 4 of the brief of this plaintiff filed amicus curiae in April, 1937, in No. 837 — Charles C. Steward Machine Company *v.* Harwell G. Davis, Collector. As there is no fundamental lack of juris-

diction, and none of the parties have made any objection because the proceeding is in equity and not at law, any such objection has been waived.

It is waivable.

> *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 554.
>
> *The Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 128 (converse).
>
> *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 363.
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> *Reynes* v. *Dumont*, 130 U. S. 354, 395.
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> *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 235, 236.
>
> *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110.
>
> *Kingsport Press, Inc.* v. *Brief English Systems, Inc.*, (C.C.A. 2d–1931) 54 F. (2d) 497, 499.

If the objection were open, it is not well founded in the particular case.

If the employer in obedience to the terms of Section 802 makes the payments, he makes them, according to the claim of the Commissioner of Internal Revenue, as payments on behalf of the employees.

If the Section is invalid, it furnishes no answer for the employer to the suits of the employees. So, the employer still must pay the equivalent amounts to the employees to complete the employer's obligation to pay them the agreed wages. He has no right to demand an assignment of refund claims from the employees. Notwithstanding this, it is claimed for the Government that the employer cannot recover the payments, because he made them not on his own behalf but as payments of the employees' monies.

As the employer has no written assignment from the employees, Revised Statutes Sec. 3477, U. S. Code,

Title 31, Chapter 6, Sec. 203, prevents any recovery by the employer.

A very similar situation was considered by the Circuit Court of Appeals for the Fifth Circuit in the *Regents of the University of Georgia* v. *Page* (1936—C.C.A. 5th), 81 Fed. (2d) 577, involving the right of the University of Georgia, which claimed exemption from the Federal Admissions Tax, to bring a bill in equity to enjoin the imposition of the tax upon tickets for admission to its athletic contests. The Circuit Court of Appeals had no difficulty in finding equity jurisdiction by reason of the fact that while the payment was made by the University the right of recovery, if any, for the amounts paid for the admission tax would rest with its patrons who had paid for tickets.

The multitude of claims which it would be necessary for employees to prosecute for refunds of small sums, each insufficient in amount to warrant the expense of a prosecution, would present such a multiplicity of suits as to call for the interposition of a court of equity to prevent this multiplicity which the decision of one suit will avoid.

A right to get a judgment against a Collector of Internal Revenue to which he may be unable to respond except there be an appropriation by The Congress for the purpose, is manifestly not as plain, adequate and complete a remedy as is the remedy of not making the payment in the first instance.

There is additional reason why the bill should lie even if the objection had been taken. The language of the Supreme Court of the United States in the leading case *Ex parte Young*, 209 U. S. 123 at 146 is appropriate. " . . . The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its [the Law's] validity. The officers and employees could

not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid (146) . . . to impose upon a party interested the burden of obtaining a judicial decision of such a question . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, . . . " (148).

If by the assistance of a court of equity the employer can be relieved from making the unconstitutional payments, the burden ought not to be placed upon the employer of going through the vast amount of accounting work and pacification of a multitude of employees, incident to taking in this year one percent off fifty-two separate weekly payments to each or twelve separate monthly payments to each of thousands of employees, when all this may be avoided by the making of a decision by the court on a constitutional question, which is inevitable before the matter is at rest.

The authorities support the contention.

Ex parte Young, 209 U. S. 123, 146.
Hill v. *Wallace*, 259 U. S. 44, 62.
Brushaber v. *Union Pac. R.R. Co.*, 240 U. S. 1, 9.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.
Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 (semble).
Dodge v. *Woolsey*, 18 Howard 341 (semble).

EDWARD F. McCLENNEN.
JACOB J. KAPLAN.

pp. 1-4-5

SUPREME COURT OF THE UNITED STATES.

No. 910.—October Term, 1936.

Guy T. Helvering, Commissioner of Internal Revenue, and William M. Welch, Collector of Internal Revenue for the District of Massachusetts, Petitioners, and The Edison Electric Illuminating Company of Boston, vs. George P. Davis, Respondent. } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 24, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7, (Supp.)) is challenged once again.

In No. 837, *Steward Machine Co.* v. *Davis*, — U. S. —, decided this day, we have upheld the validity of Title IX of the act, imposing an excise upon employers of eight or more. In this case Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX (though with different exemptions). It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for the levy of the taxes imposed by Title VIII. The plan of the two titles will now be summarized more fully.

Title VIII, as we have said, lays two different types of tax, an "income tax on employees", and "an excise tax on employers". The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid "with respect to having individuals in his employ", and, like the tax on employees, is measured by wages. Section 804. Neither tax is applicable to certain types of employment, such as

agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years. Section 811 (b). The two taxes are at the same rate. Sections 801, 804. For the years 1937 to 1939, inclusive, the rate for each tax is fixed at one per cent. Thereafter the rate increases ½ of 1 per cent every three years, until after December 31, 1948, the rate for each tax reaches 3 per cent. *Ibid.* In the computation of wages all remuneration is to be included except so much as is in excess of $3,000 during the calendar year affected. Section 811 (a). The income tax on employees is to be collected by the employer, who is to deduct the amount from the wages "as and when paid". Section 802 (a). He is indemnified against claims and demands of any person by reason of such payment. *Ibid.* The proceeds of both taxes are to be paid into the Treasury like internal-revenue taxes generally, and are not earmarked in any way. Section 807 (a). There are penalties for nonpayment. Section 807 (c).

Title II has the caption "Federal Old-Age Benefits." The benefits are of two types, first, monthly pensions, and second, lump sum payments, the payments of the second class being relatively few and unimportant.

The first section of this title creates an account in the United States Treasury to be known as the "Old-Age Reserve Account". Section 201. No present appropriation, however, is made to that account. All that the statute does is to authorize appropriations annually thereafter, beginning with the fiscal year which ends June 30, 1937. How large they shall be is not known in advance. The "amount sufficient as an annual premium" to provide for the required payments is "to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually." Section 201 (a). Not a dollar goes into the Account by force of the challenged act alone, unaided by acts to follow.

Section 202 and later sections prescribe the form of benefits. The principal type is a monthly pension payable to a person after he has attained the age of 65. This benefit is available only to one who has worked for at least one day in each of at least five sep-

arate years since December 31, 1936, who has earned at least $2,000 since that date, and who is not then receiving wages "with respect to regular employment." Sections 202 (a), (d), 210 (c). The benefits are not to begin before January 1, 1942. Section 202 (a). In no event are they to exceed $85 a month. Section 202 (b). They are to be measured (subject to that limit) by a percentage of the wages, the percentage decreasing at stated intervals as the wages become higher. Section 202 (a). In addition to the monthly benefits, provision is made in certain contingences for "lump sum payments" of secondary importance. A summary by the Government of the four situations calling for such payments is printed in the margin.[1]

This suit is brought by a shareholder of the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, to restrain the corporation from making the payments and deductions called for by the act, which is stated to be void under the Constitution of the United States. The bill tells us that the corporation has decided to obey the statute, that it has reached this decision in the face of the complainant's protests, and that it will make the payments and deductions unless restrained by a decree. The expected consequences are indicated substantially as follows: The deductions from the wages of the employees will produce unrest among them, and will be followed, it is predicted, by demands that wages be increased. If the exactions shall ultimately be held void,

[1] (1) If through an administrative error or delay a person who is receiving a monthly pension dies before he receives the correct amount, the amount which should have been paid to him is paid in a lump sum to his estate [Section 203 (c)].

(2) If a person who has earned wages in each of at least five separate years since December 31, 1936, and who has earned in that period more than $2,000, dies *after* attaining the age of 65, but before he has received in monthly pensions an amount equal to 3½ percent of the "wages" paid to him between January 1, 1937, and the time he reaches 65, then there is paid in a lump sum to his estate the difference between said 3½ percent and the total amount paid to him during his life as monthly pensions [Section 203 (b)].

(3) If a person who has earned wages since December 31, 1936, dies *before* attaining the age of 65, then there is paid to his estate 3½ percent of the "wages" paid to him between January 1, 1937, and his death [Section 203 (a)].

(4) If a person has, since December 31, 1936, earned wages in employment covered by Title II, but has attained the age of 65 either without working for at least one day in each of 5 separate years since 1936, or without earning at least $2,000 between January 1, 1937, and the time he attains 65, then there is paid to him [or to his estate, Section 204 (b)], a lump sum equal to 3½ percent of the "wages" paid to him between January 1, 1937, and the time he attained 65 [Section 204 (a)].

the company will have parted with moneys which as a practical matter it will be impossible to recover. Nothing is said in the bill about the promise of indemnity. The prediction is made also that serious consequences will ensue if there is a submission to the excise. The corporation and its shareholders will suffer irreparable loss, and many thousands of dollars will be subtracted from the value of the shares. The prayer is for an injunction and for a declaration that the act is void.

The corporation appeared and answered without raising any issue of fact. Later the United States Commissioner of Internal Revenue and the United States Collector for the District of Massachusetts, the petitioners in this court, were allowed to intervene. They moved to strike so much of the bill as has relation to the tax on employees, taking the ground that the employer, not being subject to tax under those provisions, may not challenge their validity, and that the complainant shareholder, whose rights are no greater than those of his corporation, has even less standing to be heard on such a question. The intervening defendants also filed an answer which restated the point raised in the motion to strike, and maintained the validity of Title VIII in all its parts. The District Court held that the tax upon employees was not properly at issue, and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction, and dismissed the bill. On appeal to the Circuit Court of Appeals for the First Circuit, the decree was reversed, one judge dissenting. — F. (2d) —. The court held that Title II was void as an invasion of powers reserved by the Tenth Amendment to the states or to the people, and that Title II in collapsing carried Title VIII along with it. As an additional reason for invalidating the tax upon employers, the court held that it was not an excise as excises were understood when the Constitution was adopted. Cf. *Davis* v. *Boston & Maine R. R. Co.*, — F. (2d) —, decided the same day.

A petition for certiorari followed. It was intervening defendants, the Commissioner and brought two questions and two only, to our no asked to determine: (1) "whether the tax impo by Section 804 of the Social Security Act is Congress under the Constitution", and (2) "wh of the tax imposed upon employees by Section Security Act is properly in issue in this cas whether that tax is within the power of Congr Constitution". The defendant corporation gav Clerk that it joined in the petition, but it in any subsequent proceedings. A writ of cer

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~~case, and if it is, whether that tax is within the power of Congress under the Constitution". A writ of certiorari issued.~~

First: Questions as to the remedy invoked by the complainant confront us at the outset.

Was the conduct of the company in resolving to pay the taxes a legitimate exercise of the discretion of the directors? Has petitioner a standing to challenge that resolve in the absence of an adequate showing of irreparable injury? Does the acquiescence of the company in the ~~decree for an injunction~~ affect the answer to those questions? Though power may still be ours to take such objections for ourselves, is acquiescence effective to rid us of the duty? Is duty modified still further by the attitude of the Government, its waiver of a defense under section 3224 of the Revised Statutes, its waiver of a defense that the legal remedy is adequate, its earnest request that we determine whether the law shall stand or fall? The writer of this opinion believes that the remedy is ill conceived, that in a controversy such as this a court must refuse to give equitable relief when a cause of action in equity is neither pleaded nor proved, and that the suit for an injunction should be dismissed upon that ground. He thinks this course should be followed in adherence to the general rule that constitutional questions are not to be determined in the absence of strict necessity. In that view he is supported by Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice ROBERTS. However, a majority of the court have reached a different conclusion. They find in this case extraordinary features making it fitting in their judgment to determine whether the benefits and the taxes are valid or invalid. They distinguish *Norman* v. *Consolidated Gas Co.*, — F. (2d) —, recently decided by the Court of Appeals for the Second Circuit, on the ground that in that case, the remedy was challenged by the company and the Government at every stage of the proceeding, thus withdrawing from the court any marginal discretion. The ruling of the majority removes from the case the preliminary objection as to the nature of the remedy which we took of our own motion at the beginning of the argument. Under the compulsion of that ruling, the merits are now here.

Second: The scheme of benefits created by the provisions of Title II is not in contravention of the limitations of the Tenth Amendment.

Congress may spend money in aid of the "general welfare". Constitution, Art. I, section 8; *United States* v. *Butler*, 297 U. S. 1, 65; *Steward Machine Co.* v. *Davis, supra*. There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra*. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." *United States* v. *Butler, supra*, p. 67. Cf. *Cincinnati Soap Co.* v. *United States*, May 3, 1937, — U. S. —; *United States* v. *Realty Co.*, 163 U. S. 427, 440; *Head Money Cases*, 112 U. S. 580, 595. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 442. Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra*, has set the doubt at rest. But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue

becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups.[2] Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance.[3] A great mass of evidence was brought together supporting the policy which finds expression in the act. Among the relevant facts are these: The number of persons in the United States 65 years of age or over is increasing proportionately as well as absolutely. What is even more important the number of such persons unable to take care of themselves is growing at a threatening pace. More and more our population is becoming urban and industrial instead of rural and agricultural.[4] The evidence is impressive that among industrial workers the younger men and women are preferred over the older.[5] In times of retrenchment the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reemployment. Statistics are in the brief. A few illustrations will be chosen from many there collected. In 1930, out of 224 American factories investigated, 71, or almost one third, had fixed maximum hiring age limits; in 4 plants the limit was under 40; in 41 it was under 46. In the other 153 plants there were no fixed limits, but in practice few were hired if they were over 50 years of age.[6] With the loss of savings inevitable in periods of idleness, the fate of workers over 65, when thrown out of work, is little less than des-

[2] Report to the President of the Committee on Economic Security, 1935.

[3] Hearings before the House Committee on Ways and Means on H. R. 4120, 74th Congress, 1st session; Hearings before the Senate Committee on Finance on S. 1130, 74th Congress, 1st Session.

[4] See Report of the Committee on Recent Social Trends, 1932, vol. 1, pp. 8, 502; Thompson and Whelpton, Population Trends in the United States, pp. 18, 19.

[5] See the authorities collected at pp. 54-62 of the Government's brief.

[6] Hiring and Separation Methods in American Industry, 35 Monthly Labor Review, pp. 1005, 1009.

perate. A recent study of the Social Security Board informs us that "one-fifth of the aged in the United States were receiving old-age assistance, emergency relief, institutional care, employment under the works program, or some other form of aid from public or private funds; two-fifths to one-half were dependent on friends and relatives, one-eighth had some income from earnings; and possibly one-sixth had some savings or property. Approximately three out of four persons 65 or over were probably dependent wholly or partially on others for support.'" We summarize in the margin the results of other studies by state and national commissions.[8] They point the same way.

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. This is brought out with a wealth of illustration in recent studies of the problem.[9] Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing

[7] Economic Insecurity in Old Age (Social Security Board, 1937), p. 15.

[8] The Senate Committee estimated, when investigating the present act, that over one half of the people in the United States over 65 years of age are dependent upon others for support. Senate Report, No. 628, 74th Congress, 1st Session, p. 4. A similar estimate was made in the Report to the President of the Committee on Economic Security, 1935, p. 24.

A Report of the Pennsylvania Commission on Old Age Pensions made in 1919 (p. 108) after a study of 16,281 persons and interviews with more than 3,500 persons 65 years and over showed two fifths with no income but wages and one fourth supported by children; 1.5 per cent had savings and 11.8 per cent had property.

A report on old age pensions by the Massachusetts Commission on Pensions (Senate No. 5, 1925, pp. 41, 52) showed that in 1924 two thirds of those above 65 had, alone or with a spouse, less than $5,000 of property, and one fourth had none. Two thirds of those with less than $5,000 and income of less than $1,000 were dependent in whole or in part on others for support.

A report of the New York State Commission made in 1930 (Legis. Doc. No. 67, 1930, p. 39) showed a condition of total dependency as to 58 per cent of those 65 and over, and 62 per cent of those 70 and over.

The national Government has found in connection with grants to states for old age assistance under another title of the Social Security Act (Title I) that in February, 1937, 38.8 per cent of all persons over 65 in Colorado received public assistance; in Oklahoma the percentage was 44.1, and in Texas 37.5. In 10 states out of 40 with plans approved by the Social Security Board more than 25 per cent of those over 65 could meet the residence requirements and qualify under a means test and were actually receiving public aid. Economic Insecurity in Old Age, *supra*, p. 15.

[9] Economic Insecurity in Old Age, *supra*, chap. VI, p. 184.

themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. *Steward Machine Co.* v. *Davis, supra*. A system of old age-pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom. Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be set aside at will in one state or another whenever local policy prefers the rule of *laissez faire*. The issue is a closed one. It was fought out long ago.[10] When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

Third: Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.

The argument for the respondent is that the provisions of the two titles dovetail in such a way as to justify the conclusion that Congress would have been unwilling to pass one without the other. The argument for petitioners is that the tax moneys are not earmarked, and that Congress is at liberty to spend them as it will. The usual separability clause is embodied in the act. Section 1103.

We find it unnecessary to make a choice between the arguments, and so leave the question open.

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[10] IV Channing, History of the United States, p. 404 (South Carolina Nullification); 8 Adams, History of the United States (New England Nullification and the Hartford Convention).

Fourth: The tax upon employers is a valid excise or duty upon the relation of employment.

As to this we need not add to our opinion in *Steward Machine Co.* v. *Davis, supra*, where we considered a like question in respect of Title IX.

Fifth: The tax is not invalid as a result of its exemptions.

Here again the opinion in *Steward Machine Co.* v. *Davis, supra*, says all that need be said.

Sixth: The decree of the Court of Appeals should be reversed and that of the District Court affirmed.

Ordered accordingly.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER are of opinion that the provisions of the Act here challenged are repugnant to the Tenth Amendment, and that the decree of the Circuit Court of Appeals should be affirmed.